

NO. 45269-3-II
(Clark County Superior Court Cause No. 12-2-02455-7)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

KLICKITAT COUNTY,

Appellant,

v.

FRIENDS OF THE WHITE SALMON RIVER and
FRIENDS OF THE COLUMBIA GORGE,

Respondents.

**KLICKITAT COUNTY'S COMBINED
RESPONSE BRIEF AND REPLY ON CROSS APPEAL**

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GLOSSARY

FOCG	Friends of the Columbia Gorge and Friends of the White Salmon River
EIS	Environmental Impact Statement
GMA	Growth Management Act, Ch. 36.70A RCW
KCC	Klickitat County Code
MDNS	County's Mitigated Determination of Non-Significance, which includes an Addendum and Four Incorporated EIS's
Ordinance	Klickitat County Ordinance O060512-1
Resolution	Klickitat County Resolution 08612
FOCG's Brief	Respondents/Cross Appellants' Opening Brief
SEPA	State Environmental Policy Act, Ch. 43.21C RCW
WDFW	Washington Department of Fish and Wildlife

1. INTRODUCTION

FOCG's brief is a 73 page work of fiction. In the fictional universe FOCG conjures up, Klickitat County is allowing thousands of units of sprawling development to mow down a pristine landscape and is doing so based on flawed technical analysis and in blatant disregard of agency comment. It is FOCG, not the County, which creates a mirage.

The truth is that the County has put in extraordinary effort over a multi-year period to plan responsibly for growth, to preserve its natural resource lands base, and to protect its environmental resources. FOCG's litigation tactics threaten this sound planning. If the County's actions are remanded, and the new zoning requirements are unwound, the County would revert to a regulatory structure with loopholes allowing for increased densification throughout an approximately 20,000 acre area.¹ Instead of predictable and planned development located to a large degree within the boundaries of two water service districts and the fire district,² and taking up less than 4% of the total planning area,³ development would be encouraged to sprawl well outside these service areas and throughout 20,000 acres, ultimately threatening the County's 30,000 acres of outlying GMA designated forest resource lands.⁴

¹ AR 200078 (SEPA Ex. 2, Hydrologic Report), outlying RL (Resource Lands) zoning covers 17,741 acres, which the County revised to close loopholes. *See* sections 2.2, 2.3, and 2.7.

² AR 200012 (SEPA Ex. 1, Addendum), water district boundaries map; AR 210617 (SEPA Ex. 20), fire district boundaries map.

³ AR 200003 (SEPA Ex. 1, Addendum); AR 199 (Fact Sheet).

⁴ AR 12, at Appendix 1 (zoning map, showing outer ring of resource lands).

The County legislation closed the loopholes which would have allowed this to happen.⁵ And contrary to FOCG's assertions, the County did so after thorough review and exhaustive agency consultation. Although several agencies initially had concerns, once they consulted with the County, and understood the proposal, they realized that the County was improving the regulatory structure. As a result, their later comments support the County's action.⁶

FOCG goes through incredible contortions to distort these basic facts. FOCG cites to WDFW comment issued years before the County made its SEPA determination, and to comment prepared by an employee who left the agency and FOCG promptly retained as a witness.⁷ FOCG ignores later WDFW comment submitted by personnel who had consulted with the County and which supports the proposal.⁸ FOCG cites extensively to Forest Service comment, but ignores that after the County narrowed the proposal's scope, which included increasing River setbacks and pulling over 200 acres from the proposal, the Forest Service submitted no further comment.⁹ FOCG asserts that Ecology slammed the proposal,¹⁰

⁵ See section 2.7 below describing old and new zoning.

⁶ See section 2.2 on agency comment; AR 210769-70, 772-74, 777 (SEPA Ex. 31).

⁷ See section 2.2 addressing WDFW comment; AR 1008 (listing former WDFW employee Mr. Labbe as a witness).

⁸ See section 2.2 on agency comment; AR 210769-70, 772-74, 777 (SEPA Ex. 31).

⁹ See CP 702-3 (TR, SEPA Hrg., December 20, 2011), pgs. 366-67; AR 200011 (SEPA Ex. 1, Addendum, map of property removed from rezone, including along River); AR 200015 (SEPA Ex. 1, Addendum, description of added 100 foot River setbacks).

¹⁰ FOCG's Brief, pg. 3. FOCG asserts Ecology submitted "extensive comments," expressing "significant concerns." FOCG provides no citation.

but ignores comment submitted after consultation and proposal revision confirming water supply concerns had been addressed.¹¹

To deal with the uncontroverted fact that the County took legislative action to plan for not thousands, but 259, new residential units over 20 years within a 50,000 acre planning area,¹² FOCG pretends the County's land capacity analysis does not exist. FOCG does essentially the same thing to deal with the fact that densities decrease proximate to two key tributaries and River setbacks increase by 100 feet.¹³

FOCG then takes on the County's expert witnesses from Aspect Consulting, who are well-respected water resource professionals in Washington.¹⁴ FOCG does not disclose that its water resource witness filed a licensing complaint against the County's expert witnesses.¹⁵ The complaint threatened their professional livelihoods, forcing the witnesses to independently obtain legal representation.¹⁶ The Licensing Board summarily dismissed the complaint, finding the County's analysis likely

¹¹ AR 210772-73 (SEPA Ex. 31, Ecology Comment, December 8, 2011). Earlier Ecology comment was based on incorrect facts - *i.e.*, that the County was planning for 10,602 new persons. AR 210652 (SEPA Ex. 25).

¹² AR 210983 (SEPA Ex. 44); AR 210628-46 (SEPA Ex. 22); AR 5 (Ordinance) Finding D-10; AR 953 (Examiner Decision) Findings 2.3.9-10; CP 697-700 (TR, SEPA Hrg., December 20, 2011, testimony on development capacity), pgs. 361-64; CP 827-28 (TR, SEPA Hrg., January 23, 2012, FOCG's responses to Hearing Examiner questions on development capacity), pgs. 98-99.

¹³ FOCG attempts to confuse the Court by asserting there is no setback. As addressed in section 3.6.2, County regulations require the setback. The density reduction is described at AR 200004-5 (SEPA Ex. 2, Addendum, ¶¶ 1.3 and 3).

¹⁴ The County Commissioners considered materials from FOCG and Aspect, noting Aspect's reputation "is sterling." CP 327 (TR, Leg. Hrg., May 22, 2012), pg. 20:11-20.

¹⁵ AR 510-25 (complaint filed against County witnesses).

¹⁶ The complaint alleged unprofessional conduct pursuant to RCW 18.220.130. AR 510-15. Aspect submitted a response from legal counsel, with technical analysis. AR 516-35.

"more conservative" than FOCG's, and determined the complaint was **"without merit."**¹⁷

Throughout this litigation, FOCG has misrepresented County action. It has done so in submittals to Ecology,¹⁸ to the Licensing Board,¹⁹ and even through a last minute attempt before the County Hearing Examiner, when, despite strict deadlines for exhibit submittal, FOCG sought to ambush the County by submitting 18 new exhibits during days one and two of the hearing.²⁰ All exhibits were admitted, even one during the last day of witness testimony, which FOCG claimed it had just found out about, although FOCG had been aware of it all along.²¹

So with these heavy handed tactics, where are FOCG's thousands of residential units? Where is this sprawling development? Where are the tributary draw downs? Where are the River impacts? A year later, with the rezone, not one new lot had been created.²²

FOCG paints quite the picture, but it does not exist. With a remand and an unwinding of the new zoning improvements, this rural jurisdiction, in which planning is largely voluntary, would have no

¹⁷ AR 942-43, emphasis in text.

¹⁸ FOCG's witness submitted an unsolicited report to Ecology charging Aspect with "serious errors and miscalculations." AR 537-47, 548, 556. See AR 548-55 for Aspect's response.

¹⁹ AR 942-43 (Licensing Board decision); AR 516-35 (Aspect's response to complaint).

²⁰ AR 1118, AR 1152-53.

²¹ CP 653-54, 58-59 (TR, SEPA Hrg., December 20, 2011), pgs. 317-18, 322-23; AR 211211 (Ex. 48).

²² CP 1444-45 (three short plats, with a potential for five new lots, submitted, but no approvals issued); CP 1678-79 (Certificate of Notice, February 19, 2014, Supplemental Designation of Clerk's Papers filed with this brief, only two new lots created).

incentive to plan. All improvements would be nixed. After years of effort, which included hiring a mediator,²³ retaining professional consultants,²⁴ consulting extensively with agencies,²⁵ and being rewarded with costly and unending litigation, why would a rural jurisdiction bother?

Perhaps FOCG would make different policy choices than the County. **However, the Court does not decide policy in reviewing local legislation. Although FOCG asks the Court to do just that, this is impermissible. Unless legislation is arbitrary and capricious, it is upheld.** The County does not have the "burden" to "demonstrate" it meets certain criteria, as FOCG repeatedly asserts.²⁶ FOCG has the burden of proof and the SEPA facts are viewed in the County's favor. Further, the unchallenged Hearing Examiner and Board of County Commissioner findings, based on extensive records developed at the contested SEPA hearing and during the five year legislative process, are verities on appeal.

Despite FOCG's aggressive tactics, the matter is simple. The County decided to plan for its future. This entailed closing zoning code loopholes and predictably planning for 259 new residences over a 20-year planning period.²⁷ Although no EIS was required, the County incorporated

²³ AR 200005 (SEPA Ex. 1, Addendum, "County engaged the services of a mediator...."); AR 855-62 (Settlement Agreement).

²⁴ See e.g., AR 200027-107 (SEPA Ex. 2, Hydrologic Report).

²⁵ See section 2.2 on agency comment; see also AR 210769-70, 772-74, 777 (Ex. 31).

²⁶ See e.g., FOCG's Response Brief, pg. 24 (Court reviews "whether County has met its burden of demonstrating SEPA compliance"); pg. 37 ("County attempts to shift its burden"); pg. 67 ("the County has not shown consistency with this requirement").

²⁷ AR 2-50 (Ordinance O060512-1); AR 4-5 (Ordinance), Findings ¶¶ D-4, 5, and 10; AR 953-4 (Examiner's Decision), ¶¶ 2.3.9-10, 2.4.1-.2. Land capacity analysis addressed at

four, including one assessing impacts from residential development **within the exact area rezoned.**²⁸ County SEPA review was not "clear error," and County legislative policy choices were reasoned. Without arbitrary and capricious action, and with FOCG's blatant misrepresentations, the Superior Court erred in reversing, and the County respectfully requests that the Court direct summary judgment in the County's favor.

2. REPLY IN SUPPORT OF STATEMENT OF THE CASE

2.1. FOCG Mischaracterizes the Local Communities of Husum and BZ Corner

Within the 50,000 acre Planning Area are two unincorporated rural communities, Husum and BZ Corner, which have no formally established geographic boundaries.²⁹ These areas are planned for development, as opposed to the outlying areas designated under GMA for natural resource use. The County is committed to protecting its natural resource lands, and recently completed its GMA update, which was not appealed.³⁰

AR 200005, 210628-46, 210983-86 (SEPA Exs. 1, 22, and 44), CP 697-700 (TR SEPA Hrg., December 20, 2011), pgs. 361-4. FOCG did not challenge this analysis, telling the Examiner it was "not sure" if it was correct. CP 827-28 (TR, SEPA Hrg., January 23), 2012, pgs. 98-99; *see generally*, AR 59-60, 199-200 (Q&A Sheet and Fact Sheet).

²⁸White Salmon River EIS, AR 200125-496 (SEPA Ex. 4), maps of area addressed are at AR 200491-96. The three other EIS's are at AR 200497-209852 (SEPA Exs. 5-7).

²⁹Nor are their boundaries defined by the County's old Comprehensive Plan map, which simply sets forth prior land use designations. FOCG's Response Brief, pg. 58, FN 214.

³⁰Ordinance O09013 (September 3, 2013). The area rezoned is not designated for GMA resource use, partly due to long standing economic conditions. AR 200301 (SEPA Ex. 4, White Salmon EIS, pg. III-51) ("In most cases, farming activities are not the principle means of earning a living for the owners," as due to land prices "it would not be economically viable to purchase property with the intent of making a profit by farming.").

These two rural communities have long been more developed. Even in 2007, when an early staff report was prepared for Planning Commission review, the Husum area was depicted as far more parcelized than the outlying areas.³¹ A list of permit approvals attached to the staff report identifying development approvals depicts a comparatively high degree of parcelization along the Highway 141 corridor.³² More updated information is provided in building permit logs from 2006-11. A picture showing the permit locations reveals most development and parcelization is occurring within these areas, along the Highway 141 corridor.³³

The County does not fully plan under GMA, so is not subject to requirements for addressing urban "sprawl."³⁴ As a slower growing County, requiring such an expenditure of resources would not make much sense, given the County is only planning for several hundred units, not the thousands FOCG insinuates. Nevertheless, the County went through that basic planning exercise, calculated the demand for growth in the Planning Area over the next 20 years, calculated how many units the updated zoning provided for, and planned for growth within these more developed areas. Staff identified the rationale for the zoning, which is also elaborated on in the Board of County Commissioners' extensive and unchallenged findings.

³¹ AR 209874-76, 209878-82 (SEPA Ex. 11).

³² AR 209898-99 (SEPA Ex.11).

³³ AR 819.

³⁴ RCW 36.70A.040.

The RR1 and RR2 densities can achieve these objectives, while respecting the rural nature of the Planning Area, and protecting the natural attributes residents come to the area for. These densities also allow for the small-scale agricultural uses (large garden plots; small-scale farm animal uses) that residents are accustomed to maintaining. These uses become less feasible and can raise more issues on smaller lots. Using RR1 and RR2 as proposed is not only consistent with land uses and patterns within the community, but also ensures infrastructure can be better provided, consistent with the regulatory structure.³⁵

Growth in this Subarea was approached differently than it would be in Portland, where the group funding this litigation is based. However, the concern in this rural area is not "sprawl." There is not enough development for that to even be an issue, despite the repeated reference to same throughout FOCG's briefing. Further, there is no "bright line rule" on what density is appropriate for an area,³⁶ and certainly not for a jurisdiction which only partially plans under GMA. Nevertheless, the County determined appropriate densities consistent with preserving its natural resource base and rural character.

2.2. FOCG Mischaracterizes Agency Comment

FOCG mischaracterizes the agency comment submitted. The proposal was revised in response to agency comment, so initially

³⁵ AR 60-61 (If the Planning Area attracts 12% of the growth the state projects for the County through 2030, there is a need for 1,140 residences. With 601 existing residences, this creates demand for 539 residences.) An earlier buildable lands inventory, from 2007, estimated demand for 323 homes through 2026. AR 209869, 872 (SEPA Ex. 11, Staff Report). See also AR 210628-46 (SEPA Ex. 22, data on every parcel rezoned).

³⁶ *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129-30, 118 P.3d 322 (2005) (GMA has no specific density requirements; "GMA creates a general 'framework' to guide local jurisdictions instead of 'bright line' rules.").

unfavorable comment became supportive as the agencies became better informed and the County revised the proposal. For example, FOCG states, "WDFW submitted a comment 'finding it astonishing that' WDFW had not yet been consulted and recommending that the County reject a case by case process for dealing with proposals that may impact wildlife resources."³⁷ **This was a comment from 2007,³⁸ several years before the SEPA determination which FOCG appealed was issued.³⁹** The County engaged in extensive consultation, as reflected in later comment. **"We at the Washington Department of Fish and Wildlife (WDFW) appreciate the ongoing dialogue between our agencies about this important project."⁴⁰ "We appreciate the county's willingness to integrate many of the elements we suggested"**⁴¹

FOCG cites to another comment before the County's SEPA determination was made. "WDFW urged the County to exercise caution, stating that increasing residential well systems in the Rezone area would 'risk depletion of shallow aquifers, which are critical water resources for streams and wetlands that sustain fish and wildlife.'"⁴² This comment was

³⁷ FOCG's Brief, pg. 11, citing to AR 211565 (SEPA Ex. 112).

³⁸ AR 211565 (SEPA Ex. 112).

³⁹ AR 200112 (SEPA Ex. 3, MDNS issued November 5, 2010).

⁴⁰ AR 210769 (SEPA Ex. 31, WDFW December 5, 2011 comment), emphasis added.

⁴¹ AR 210771 (SEPA Ex. 31, WDFW October 25, 2011 comment), emphasis added.

⁴² FOCG's Brief, pg. 13, citing to AR 215971 (SEPA Ex. 155).

submitted before the County's SEPA decision on a separate rezone proposal within the rezone area which was never enacted.⁴³

FOCG cites extensively to comment written by a former WDFW employee who later left WDFW employment and was promptly retained by FOCG as a witness.⁴⁴ While in WDFW's employment, that individual admitted to confusion over the County's pre-existing Resource Lands zoning. "WDFW has had difficulty in the past evaluating potential development impacts for wildlife on lands zoned 'Resource Lands,'" finding it "frequently confusing and not transparent."⁴⁵ In later comment, the employee admitted the zoning "may be difficult to administer," but failed to appreciate the significance of a code provision that allows repeated densification on the same property without mitigation or public notice.⁴⁶ This employee's comments were submitted before additional consultation occurred to ensure WDFW understood the existing and proposed zoning. After this consultation, and after this employee left the agency, WDFW recognized the County was improving a regulatory

⁴³ AR 215969 (SEPA Ex. 155, WDFW letter dated January 16, 2009).

⁴⁴ See FOCG's Response Brief at pgs. 10, 37-39, 42.

⁴⁵ AR 211574 (SEPA Ex. 114, WDFW March 3, 2010 comment).

⁴⁶ AR 211576-77 (SEPA Ex. 115). The comment may have been politically motivated, given the unusually long list of individuals cc'd (eight from four different entities). See AR 211578 (SEPA Ex. 115) and AR 211575 (SEPA Ex. 114).

structure which had been plagued with loopholes and was now better protecting wildlife.

One of the main points we took from recent conversation was that the Resource Lands (RL) zoning designation allows for repeated land divisions with no minimum lot size. The county evaluates RL properties based on criteria in the code, and based on the evaluation assigns a density to which the property may divide. This division includes a cluster element, with a requirement to set aside an open space area.

However the protections for the open space area are not permanent; 5 years later the open space can be re-evaluated and divided again in perpetuity. Because of this repeatability, RL zoning ends up having a high potential for development, and it is not an effective means of protecting resources or open space. **Rezoning RL to RR-1 or RR-2 could establish better guidelines for the development of those lands.**⁴⁷

WDFW recommended tightening the Resource Lands zoning.⁴⁸ Contrary to FOCG's assertion that WDFW comment was not addressed,⁴⁹ the County responded by requiring at least an equivalent amount of land to be set aside as mitigation if more than one evaluation is requested on a property, and imposing public notice requirements.⁵⁰

⁴⁷ AR 210769-70 (SEPA Ex. 31), emphasis added.

⁴⁸ AR 210770 (SEPA Ex. 31).

⁴⁹ FOCG's Response Brief, pgs. 48-49, and FN 180.

⁵⁰ AR 44 (KCC 19.53.050(B); AR 47 (KCC 19.53.120); AR 57. WDFW comment at CP 508 incorporates past comment not to suggest the County had not responded to agency concerns, but to underscore concern with Resource Lands zoning loopholes, which the County would be closing by legislative action. The November 8, 2011 WDFW e-mail FOCG references on mitigation (CP 1103) precedes later comment at AR 210769-70 (SEPA Ex. 31, December 5, 2011), which addresses the proposal in its entirety.

FOCG also cites extensively to Forest Service comments. However, after the County narrowed the proposal, reducing it by 209 acres, and removing most property adjacent to the White Salmon River in the Husum area,⁵¹ and doubled setbacks on property not removed,⁵² the Forest Service submitted no further comment.⁵³

Thus, contrary to FOCG's blanket assertions, the County consulted with the relevant agencies and, after this process, without exception, commenting agencies supported the proposed legislation.

2.3. County Zoning Improves Fish Habitat Protection

With the County's legislation, fish habitat protection improves:

- Densities are reduced proximate to the two key tributaries, Indian Creek and Rattlesnake Creek;⁵⁴
- Development intensities do not increase proximate to any fisheries habitat;⁵⁵
- Most rezoned land is at least 200 feet from the River and most development cannot occur proximate to fish-bearing tributaries due to 150-200 foot setbacks;⁵⁶

⁵¹ AR 200005, 11 (SEPA Ex. 1, Addendum) ("As a result of the mediation, this Addendum clarifies" that 209 acres have been removed from the proposal.).

⁵² AR 200015 (SEPA Ex. 1, Addendum, description of added 100 foot River setbacks).

⁵³ There is no further Forest Service comment in the Administrative Record; *see also* CP 702-03 (TR, SEPA Hrg., December 20, 2011, pgs. 366-67).

⁵⁴ AR 7, Finding E-9; AR 5, Finding D-10; AR 12, at Appendix 1 (zoning map).

⁵⁵ *See* section 2.7 comparing old and new zoning and below bullet on setbacks.

⁵⁶ AR 11 (SEPA Ex. 1, map of property fronting the River removed from proposal); AR 210304 (SEPA Ex. 14, Critical Areas Ordinance setbacks); *see also* AR 210158-280 (SEPA Ex. 13, Shoreline Master Plan).

- Loopholes creating the potential for excessive development under the old zoning code were removed;⁵⁷
- Water usage does not increase with the rezone;⁵⁸
- County hydrologists calculated total water supply impacts, and determined there were no significant adverse impacts;⁵⁹
- Except for a footnote, FOCG has abandoned its stormwater impacts argument, presumably because the State Dept. of Licensing, Geologist Board determined the County's analysis was "likely more conservative" than FOCG's;⁶⁰ and,
- River flow impacts are "negligible."⁶¹

The County also imposes requirements on development to preserve habitat through its Critical Areas Ordinance and Shoreline Master Plan. The County adopted the Critical Areas Ordinance pursuant to an agreement with the State Departments of Fish and Wildlife, Commerce, and Ecology,⁶² and recently updated it pursuant to GMA.⁶³ The Shoreline Master Plan has been revised on at least four occasions.⁶⁴ FOCG did not appeal.

⁵⁷ See AR 44 (KCC 19.53.050(B) and AR 47 (KCC 19.53.110, .120). These provisions add public notice requirements; impose an expiration date for resource land evaluations; and require mitigation for more than one such evaluation.

⁵⁸ See section 3.3.1.2; AR 210986 (SEPA Ex. 44, state population projections); AR 60 (growth will occur regardless of County action).

⁵⁹ AR 200037-40 (SEPA Ex. 2, Table E-1, Summary of Impacts and Mitigation).

⁶⁰ AR 942-43.

⁶¹ FOCG's own witness characterized even greater impacts as "negligible." AR 216220-21 (SEPA Ex. 176, Aquifer Test Rpts.); *see also* CP 545:5-22 (TR, SEPA Hrg., December 19, 2011, pg. 213:5-22, impacts are not "measurable.").

⁶² AR 210281-90 (SEPA Ex. 14, Critical Areas Ordinance settlement agreement).

⁶³ Ordinance O080613 (August 6, 2013); AR 210281-309 (SEPA Ex. 14).

⁶⁴ AR 210158-280 (SEPA Ex. 13, Shoreline Plan), revision dates at AR 210158-64.

2.4. FOCG Mischaracterizes Fish Habitat

The rezone improves fish habitat. As such, FOCG cannot identify where development will increase in a way which harms that habitat. So, FOCG resorts to blanket speculation about pristine fish runs which may exist in the future, which County action will decimate. Yet, even FOCG's highly generalized statements are off base.

For example, FOCG makes a statement about limiting factors for fish species⁶⁵ but does not disclose the document it is relying on addresses habitat below Condit Dam and outside the rezone area; even the tributary references are for a completely different river.⁶⁶ Similarly, FOCG includes blanket statements about water temperatures,⁶⁷ but relies on a document describing conditions outside the area rezoned.⁶⁸ FOCG asserts "[r]eports conducted by DOE confirmed that the River's tributaries suffer from poor water quality due to high temperatures."⁶⁹ Yet, the reports FOCG reference list the White Salmon River as being compliant with regard to temperature and do not include temperature readings for tributaries. In contrast, the County's Hydrologic Report correctly addresses temperature

⁶⁵ FOCG's Brief, pg. 9, citing to AR 211901 (SEPA Ex. 122).

⁶⁶ AR 211901 (Ex. 122, Condit Dam BiOp). The citation FOCG relies on is for critical habitat below the dam and elsewhere outside the rezone area. The tributaries NMFS addresses are on the Columbia River, not tributaries to the White Salmon River.

⁶⁷ FOCG's Brief, pg. 9, citing to AR 211930 (SEPA Ex. 122). (FOCG states, "NMFS determined that removal of Condit Dam was beneficial for threatened and endangered fish because 'temperatures will be restored to cooler conditions needed by rearing juveniles.'")

⁶⁸ The citation to the Condit BiOp refers to the "bypass reach," a mile or so reach of the River downstream of the dam where water was diverted to power generating turbines.

⁶⁹ FOCG's Brief, pg. 14, citing to AR 212448-61 (SEPA Ex. 128).

concerns within the area rezoned, outlines mitigation, and finds impacts can be mitigated, which occurred with the County's density reductions proximate to key tributaries.⁷⁰

FOCG emphasizes the significance of tributary streams "that had been previously submerged under the reservoir behind the dam,"⁷¹ although the rezone was pulled back from the reservoir area.⁷² FOCG goes on to discuss how the White Salmon River and its tributaries are critical for ESA recovery efforts, but fails to note the document cited to is a draft which was never published.⁷³

FOCG's treatment of fecal coliform exceedences are no different. Fecal coliform exceedences have not even been traced to residential development, yet if one were to believe FOCG's argument, homes present significant issues and new septic systems are about to make things even worse. Yet, even where residences were initially identified as a potential

⁷⁰ See e.g., AR 200037, 66-77 (SEPA Ex. 2, Hydrologic Report), pgs. 4, and 33-34.

⁷¹ FOCG's Brief, pg. 9, citing to AR 216266-77 (SEPA Ex. 186).

⁷² See e.g., AR 12 (zoning map) and AR 200011 (SEPA Ex. 1, Addendum). FOCG cites to PacifiCorp's monthly FERC report, filed in November, 2011. The report shows stream beds drawn over aerial photos. The highlighted stream bed tracks go to the former lake bed edge. They do not show if the streams now incise down to the new River elevation. Also, the streams may be unnamed, but they were not unknown. Prior to dam removal they flowed (when they flowed) to the River. It's just that at that time the River at that location was lake-like due to the dam.

⁷³ FOCG's Brief, pg. 9, citing to AR 212276-77 (SEPA Ex. 124) ("The health of the River and its tributaries is critical to the recovery efforts for the federally listed fish species."). FOCG's citation is to a draft "ESA Recovery Plan for the White Salmon River Population of Middle Columbia River Steelhead." The plan was never adopted. Instead, a multi-species plan was published. 78 FR 41911, July 12, 2013. Also, the health of the White Salmon River and its tributaries is not critical to ESA-listed steelhead recovery (AR 576; AR 210990, SEPA Ex. 45) and the draft plan does not address other fish species.

culprit, when the source was later confirmed, it was either a ranching or agricultural operation. For example, FOCG asserts "[f]ecal contamination in this area is 'suspected to be from residential properties.'" ⁷⁴ The report FOCG cites instead concludes:

- **Rattlesnake Creek:** 3 of 23 samples show water quality exceedences are "suspected to be from residential properties," but onsite investigation was not conducted to determine the sources. ⁷⁵
- **Gilmer Creek:** Livestock operation was the confirmed source. ⁷⁶
- **White Salmon River:** Possible sources were a dairy manure lagoon and irrigation ditches running through livestock pasture. ⁷⁷

FOCG asserts "[w]ater quality samples taken in August 2011 from Rattlesnake Creek, a fish-bearing tributary of the River, did not meet applicable water quality standard with regard to fecal coliform bacteria." ⁷⁸

In fact, the report FOCG cites to states that of 23 samples taken over a two year period only three exceeded water quality standards. The evidence on the source was inconclusive. ⁷⁹ Elsewhere, FOCG states, "[p]oor water quality due to fecal coliform bacteria is also an issue for stretches of the

⁷⁴ FOCG's Brief, pg. 14, citing to AR 611.

⁷⁵ AR 599, 603 and 611.

⁷⁶ AR 605, 611.

⁷⁷ AR 611.

⁷⁸ FOCG's Brief, pg. 14, citing to AR 603.

⁷⁹ "Onsite sewage systems ... are one of the suspected sources ... although other possible sources cannot be ruled out completely." AR 603.

tributary Gilmer Creek, as well as the main stem River."⁸⁰ The 2008 report FOCG cites to pre-dates Ecology's 2011 report, finding these issues largely addressed.⁸¹

Few jurisdictions do more for fisheries protection than Klickitat County. The County reduced densities at key tributaries, has strict State Department of Health approved septic system requirements,⁸² and its Critical Areas Ordinance imposes riparian setbacks and protects fish habitat, consistent with the agreement with the Departments of Ecology, WDFW, and Commerce.⁸³ In addition, the County has engaged in extensive salmon recovery efforts throughout the region.

The salmon habitat recovery program led by Klickitat County in Eastern WRIA [Water Resource Inventory Area] 29 and WRIA's 30 and 31 is successful; to date, \$7,227,073 in grant funding has been awarded for 42 salmon habitat projects through the Klickitat Lead Entity program.⁸⁴

The County is also an "active participant" in federal recovery efforts.⁸⁵ Skamania County originally led the WRIA for the White Salmon River, but those efforts stalled, the WRIA was split between the

⁸⁰ FOCG's Brief, pg. 14, citing to AR 212265-66 (SEPA Ex. 124).

⁸¹ AR 578-651 (White Salmon River Watershed Fecal Coliform Bacteria Attainment Monitoring Study, 2011), *see* AR 611, Conclusions. The Gilmer Creek pollution source was traced to a livestock operation and has been addressed. AR 605. On the main stem, the suspected source is livestock, and is located above the rezone area. AR 611.

⁸² AR 210998-211034 (SEPA Ex. 46), State Health Dept. approval letter at AR 210998.

⁸³ AR 210281-309 (Ex. 14), *see* specifically AR 210302-05 (fish and wildlife habitat regulations), AR 210281-90 (settlement), AR 210283 (parties to settlement identified).

⁸⁴ AR 210989 (SEPA Ex. 45).

⁸⁵ AR 210990 (SEPA Ex. 45).

counties, and Klickitat has advocated for funding to support recovery work.⁸⁶ The County supports water resource work, and water monitoring programs are in place.⁸⁷ These efforts are in addition to the County intelligently planning ahead for growth and operating under a strict regulatory structure to protect fish habitat.

In short, in its 73 page brief, FOCG does not explain how planning for 259 residences (growth which will occur regardless of County action⁸⁸), built over a 20 year planning period under a strict regulatory regime, will have a probable, significant adverse impact on fish habitat.

2.5. FOCG's Baseless Attacks on Professional Hydrologists

The County retained expert consultants to prepare a hydrologic report,⁸⁹ which it incorporated into its SEPA review.⁹⁰ The report analyzed impacts with not 259 new homes, but several thousand.⁹¹ Even so, the report concluded ALL impacts could be mitigated, even from development far beyond the considerably smaller scale ultimately

⁸⁶ AR 210988-96 (SEPA Ex. 45, documentation of County WRIA planning efforts); AR 210995-96 (SEPA Ex. 45, request from County to Governor and State Legislature to not cut 2011 watershed planning funds).

⁸⁷ AR 210974, 210976 (SEPA Ex. 42, Wellhead Protection Plan); AR 210990 (SEPA Ex. 45); CP 547-48 (TR, SEPA Hrg., December 19, 2011, pgs. 215-16, City of White Salmon has "enlarged their water right" and has "two observation wells, two production wells, and ... a fifth monitoring well....").

⁸⁸ AR 210986 (SEPA Ex. 44, noting state's population projections); *see also* AR 60 (Q&A Sheet discussing projected growth through 2030).

⁸⁹ AR 200027-107 (SEPA Ex. 2, Hydrologic Report).

⁹⁰ AR 200110-11, 200113-16 (SEPA Ex. 3, MDNS).

⁹¹ AR 200079 (SEPA Ex. 2, Hydrologic Report).

authorized through the rezone.⁹² FOCG, whether directly or through its witnesses, has been relentless with its attacks on these professionals. Attacks have been launched with the State Department of Licensing and Department of Ecology, and before the Hearing Examiner FOCG even described their analysis as potentially a "fraud on the Court."⁹³

Yet, the analysis these professionals prepared is more conservative than the analysis FOCG's own witness prepared.⁹⁴ A perfect example is FOCG's argument on aquifer compartmentalization. FOCG has repeatedly asserted the shallow and deep aquifers are fully inter-connected,⁹⁵ meaning the shallow aquifer continually recharges the deep aquifer with precipitation. This **eliminates** withdrawal impacts.⁹⁶ But with blockage, the aquifer is blocked from recharge, so withdrawals are not offset by precipitation flowing in. Thus, the County consultants conservatively determined caution should be used in drilling into deeper aquifers which may be compartmentalized.⁹⁷ Prior to this litigation, FOCG's consultant

⁹² AR 200037-40 (SEPA Ex. 2, Hydrologic Report, Summary of Impacts and Mitigation). The table identifies no "Unmitigated Significant Adverse Impacts" even though it assesses impacts from several thousand residences, not 259. AR 200079.

⁹³ CP 653 (TR, SEPA Hrg., December 20, 2011), pg. 317:6-11; CP 767-68 (TR, SEPA Hrg., January 23, 2012, FOCG states County experts' analysis is "unethical" and a "material misrepresentation"); AR 510-35, 537-55 (complaint/reports filed with Licensing and Ecology and County experts' responses to same).

⁹⁴ 942-43 (Licensing Board rejected FOCG's witness complaint as "**without merit**").

⁹⁵ FOCG's Response Brief, pg. 51.

⁹⁶ CP 617-19 (TR, SEPA Hrg., December 20, 2011), pgs. 281-283 ("So if they are leaky ... that would be good news"), and CP 636:4-8, pg. 300:4-8 ("**It wouldn't be significant or measurable because of the abundant recharge area**"), emphasis added.

⁹⁷ AR 200034 (Hydrologic Report).

agreed, then reversed course for his client.⁹⁸ The County consultants took this view as it reflects the facts, not to find compartmentalization would "prevent interference with new wells," as FOCG asserts with no cited support.⁹⁹ This is a highly technical area that FOCG has repeatedly tried to confuse with arguments that, once investigated, are counter-productive to FOCG's case. This is particularly true here. With FOCG's approach, not only are impacts not significant, they are not even "measurable."¹⁰⁰

FOCG uses a similar approach in dealing with mitigation. FOCG broadly asserts County consultants "admitted that increased groundwater withdrawals could have a significant impact on stream baseflows and surface water temperatures,"¹⁰¹ and that there is "no explanation" of how mitigation might be accomplished.¹⁰² What FOCG does not disclose is that the Hydrologic Report is based on the build out of thousands of residences, not 259, and that the County's consultants found that:

Reduction in baseflows in White Salmon River tributaries is identified as a potential impact along with mitigation The [County's] land capacity analysis ... indicates that density will decrease along the Rattlesnake and Indian Creeks **and this in itself is mitigation.**¹⁰³

⁹⁸ AR 548-49 (This "**interpretation is not supported by previous investigations including those by Mr. Yinger himself**" who has prepared analysis finding "[t]he CRBG aquifers are generally considered to be confined."), emphasis in text.

⁹⁹ FOCG's Response Brief, pg. 51.

¹⁰⁰ CP 636:4-8 (TR, SEPA Hrg., December 20, 2011), pgs. 300:4-8.

¹⁰¹ FOCG's Response Brief, pg. 11, citing to AR 200067 (SEPA Ex. 2).

¹⁰² FOCG's Response Brief, pgs. 11-12.

¹⁰³ AR 553, emphasis added.

Further, even at the build out levels the Hydrologic Report considers, the Report found temperature impacts can "be mitigated effectively" through the County's Critical Areas Ordinance, and recommends monitoring, which is already occurring.¹⁰⁴

Few jurisdictions prepare such detailed analysis for 259 homes planned for over a 20 year planning period. And, rare is the SEPA appellant who uses arguments which result in impacts being so insignificant as to not even be "measurable."

2.6. FOCG Incorrectly Describes SEPA Review, including the Four Incorporated EIS's

FOCG misunderstands the nature of SEPA review. FOCG asserts, "[t]he MDNS did not make any legislative changes to the proposed Rezone."¹⁰⁵ An MDNS is an administrative decision, so does not make legislative changes. What the MDNS (as supplemented by the Addendum, and four EIS's) did was assess impacts, identify mitigation, and determine impacts were not of probable significance. Contrary to FOCG's assertions, mitigation is extensive.¹⁰⁶

But, the County did not stop with a fully mitigated proposal. It also incorporated available environmental review documents. These

¹⁰⁴ AR 200035 (SEPA Ex. 2, Hydrologic Report), *see also* 200036-40 (identifying impacts and mitigation); AR 200034 ("No unmitigatable impacts were identified for water quantity"); *see* FN 87 above (addressing water monitoring).

¹⁰⁵ FOCG's Brief, pg. 12.

¹⁰⁶ *See* County's Opening Brief, section 5.2.7, pgs. 29-30. This section addresses River setbacks, closure of regulatory loopholes, removal of acreage along River from proposal, density reductions at tributaries, and describes regulatory mitigation, including the Critical Areas Ordinance and Health Department regulations.

included four EIS's. The two most significant, the White Salmon River EIS and Condit Dam removal EIS's, provide information on environmental conditions within the exact area rezoned. The Condit documents include analysis on present fish and wildlife conditions, and potential future conditions, including fish runs which may exist following a 2011 dam breach expected to kill "all fish and aquatic macroinvertebrates within the White Salmon River channel downstream of the dam."¹⁰⁷ The White Salmon River EIS addresses impacts from development of thousands of residential units on fish and wildlife habitat impacts within the exact area rezoned.¹⁰⁸

Historically, water quality degradation and decreases in flows from upstream activities have been minimized due to the large in-flow of ground water within the canyon reach. As the size of the population in the entire watershed grows, potential increased stream-side development, increased water withdrawals for both drinking water and agricultural use, increased septic drainage and stormwater run-off from development may contribute to decreased water quality and low flows.¹⁰⁹

In short, the White Salmon EIS discloses impacts from far more intense development than the County is planning for, fully disclosing potential

¹⁰⁷ AR 202066, 65 (SEPA Ex. 5, Condit EIS 2010 document); AR 201607-16 (SEPA Ex. 5, Condit 2007 document). The documents identify potential fish runs and barriers to those runs, such as dams and natural falls. AR 201610.

¹⁰⁸ AR 200314-21, 139-141, 359-61 (SEPA Ex. 4, White Salmon EIS), pgs. IV-1-IV-8, S-9-S-11, IV-46 - IV-48.

¹⁰⁹ 200314-15 (SEPA Ex. 4, White Salmon EIS), pgs. IV-1-IV-2.

impacts on fish and wildlife habitat, aesthetics, and water quality and quantity.¹¹⁰ SEPA requires nothing more.

2.7. The New Zoning is More Protective than the Old Zoning

The County's new zoning is more protective than the old zoning. However, perhaps due to its name, FOCG has assumed the "Resource Lands" zoning is the most protective zoning regime. But, the old zoning presented serious concerns. Several illustrations help explain.

2.7.1. RL v. RR2 Zoning

The County rezoned acreage previously zoned RL (Resource Lands) to RR2 (Rural Residential 2). FOCG has incorrectly presumed the old RL zoning is more protective than RR2. RR2 requires a minimum of two acres per residence. Under the old RL zoning, lots as small as one quarter of an acre are permissible,¹¹¹ thus allowing for more development.

Achieving maximum build-out under the old zoning requires the use of County issued resource lands evaluations. Unlike most zoning districts which have a single density requirement (*i.e.*, one unit per two acres), in the RL district, densities are assigned through the RL evaluation process. When the density is assigned, an "open area lot" is also

¹¹⁰ AR 200129-30 (SEPA Ex. 4, White Salmon EIS Table of Contents).

¹¹¹ AR 215922 (SEPA Ex. 151).

designated. After five years, on the open area lot, another density assignment may be requested. This process can repeat every five years. The examples below illustrate how the old process works.¹¹²

Illustration 1. Assume there are 100 acres of multiple parcels represented by one applicant within the area rezoned with 21 lots ranging from .33 acres to 38.62 acres in size. 16 lots are less than two acres; the largest lot is 38.62 acres. (The assumption is reasonable, as this situation exists within the area rezoned.¹¹³) Now, assume the properties reverted from RR2 back to their original RL zoning.

Under the old zoning, for lots two acres or less, half acre divisions are authorized.¹¹⁴ Thus, on the 16 smaller lots, greater levels of development are authorized under the old zoning. With respect to the larger, 38.62 acre lot, the applicant would request an "RL evaluation" to maximize development potential. With a positive development suitability finding, ten lots would be immediately authorized.¹¹⁵ Five years later, with a second RL evaluation, an additional nine lots would be

¹¹² AR 215922-25 (SEPA Ex. 151).

¹¹³ AR 215876, 215883, 215905 (SEPA Ex. 151); CP 1473 (Declaration, July 1, 2013).

¹¹⁴ AR 215923 (SEPA Ex. 151) ("Density assignments for resource lands two acres or less shall be one dwelling unit per two acres for limited development suitability, one dwelling unit per one acre for good development suitability and two dwelling units per one acre for best development suitability. An average lot size of twenty thousand square feet shall apply.").

¹¹⁵ AR 215923 (SEPA Ex. 151, assignment of 1.3 lots per five acres, with clustering).

authorized.¹¹⁶ Thus, at five years, on the large lot, allowed units are roughly the same under the old and new zoning (19 units). However, the RL evaluation process does not stop at five years. Under the old RL zone, the landowner could request a third RL evaluation, and a fourth. The result: after twenty years, 32 lots, close to double the 19 lots RR2 could potentially allow, are authorized. These RL evaluations would be issued without the new notice and mitigation requirements.¹¹⁷ As a result, with both the larger and smaller lots, development potential under the old zoning ultimately exceeds what the new zoning authorizes.

Illustration 2. With the new legislation, an RL evaluation expires after five years.¹¹⁸ The old zoning has no such restriction. Without the new code revisions, all RL evaluations ever issued, but not implemented (there are at least 40 within the area rezoned), would be immediately usable, with no public notice and no public comment, thus hastening land division.¹¹⁹

Illustration 3. The County completed rough calculations on build-out under the old RL zoning within the area rezoned ranging from 161-

¹¹⁶ AR 215923 (SEPA Ex. 151).

¹¹⁷ AR 4 (Ordinance), Finding ¶ D-5; AR 47 (KCC 19.53.120).

¹¹⁸ AR 47 (KCC 19.53.110).

¹¹⁹ See CP 1473 (Declaration, July 1, 2013).

460 additional residences.¹²⁰ However, the estimate does not account for: (1) the new notice requirements (the new zoning requires mailed notice to property owners within 300 feet, applicable agencies, and newspaper publication); (2) the new mitigation requirements (the new zoning requires land equivalent to or greater than the land under evaluation to be set aside for resource use when more than one evaluation has been requested); and (3) the use of multiple resource lands evaluations (one every five years) to maximize total build out.¹²¹ In short, the old zoning had loopholes allowing fairly intensive development without public notice or mitigation. As a result, the County legislative body viewed the new zoning as a more predictable and better way to plan for growth in this area.¹²²

2.7.2. RC v. RR1 Zoning

The County rezoned 258 acres from Rural Center (RC) to Rural Residential 1 (RR1). RC allows 5,000 square foot minimum lot sizes. RR1 requires a minimum one acre lot (43,560 square feet).¹²³ This acreage is at the confluence of Rattlesnake and Indian Creeks. Without the rezone, on the 258 acres surrounding these two Creeks, 5,000 square

¹²⁰ CP 1473 (Declaration, July 1, 2013).

¹²¹ AR 44 (KCC 19.53.050(B)), AR 47 (KCC 19.53.120), AR 57; CP 1473 (Declaration, July 1, 2013).

¹²² AR 4 (Ordinance), Findings D-3 – D-5; AR 9 (Ordinance) Findings J-1 - J-4.

¹²³ AR 200005 (SEPA Ex. 1, Addendum).

foot lots, or lots **eight times smaller than the new zoning** are authorized.¹²⁴

2.7.3. Overlay

With the RR2 Overlay Zone, the only change is that RR2 zoning is authorized as an alternative to Resource Land's quarter acre minimum.¹²⁵ RR2 densities are authorized, if White Salmon River setbacks increase by 100 feet.¹²⁶ Without the Overlay, there is no added River setback and densities potentially increase adjacent to the River. The Overlay zone sunset over two years ago.¹²⁷

2.7.4. Additional Mitigation

The Resolution simply outlines additional mitigation. Some mitigation is required by regulation, while other mitigation, such as the habitat banking program, requires further planning work.¹²⁸

2.7.5. Densities do not Increase

As addressed above, "everybody" did not "concede" the new zoning increases densities.¹²⁹ To the contrary, the proposal reduces

¹²⁴ AR 4, 6 (SEPA Ex. 1); AR 953-4 (Examiner's Decision), Findings 2.3.9 and 2.4.3.

¹²⁵ AR 47-48 (Ch. 19.54A KCC).

¹²⁶ AR 48 (KCC 19.54A.020(B)).

¹²⁷ AR 47 (Ordinance), KCC 19.54A.010(A)). Overlay sunset on July 10, 2012.

¹²⁸ AR 47 (KCC 19.53.120); AR 53-57.

¹²⁹ See FOCG's Brief, pg. 6. Instead of agreeing with the Superior Court's statement, the County explained the zoning structure. TR, February 28, 2013, pgs. 47-50 generally, and 50:12-14 (explaining the previous Resource Lands zoning "**potentially can allow for much greater densities**"), emphasis added.

densities throughout the Planning Area. The zoning plans for predictable growth within the two communities where growth is already occurring, and restricts increased densities throughout the almost 20,000 acres of Resource Lands zoning.¹³⁰

2.7.6. After One Year, Not One New Lot Resulted

When the Superior Court entered its order, a year after the County's legislation, the County had received three plat applications, with a potential for five new lots, which could have been created under the old zoning. No plat had final approval.¹³¹ Without any new lots, development has been proceeding at a pace slower than the County's unchallenged land capacity analysis estimated, of a 259 unit build out over 20 years.¹³²

3. REPLY ARGUMENT

3.1. Standard of Review

Absent arbitrary and capricious action, zoning legislation is upheld.¹³³ "[Z]oning is a discretionary exercise of police power by a legislative authority. Courts will not review, except for manifest abuse, the exercise of legislative discretion."¹³⁴ SEPA review is also highly deferential. SEPA directs that **"the decision of the governmental agency shall be accorded substantial weight."**¹³⁵ An MDNS is upheld unless

¹³⁰ See sections 1 and 2.7.

¹³¹ CP 1444-45 (Certificate of Notice, June 18, 2013). One plat is in a downzoned area.

¹³² AR 953; *see also* CP 697-700 (TR, SEPA Hrg., December 20, 2011), pgs 361-64.

¹³³ *Leavitt v. Jefferson County*, 74 Wn. App. 668, 674, 678, 875 P.2d 681(1994).

¹³⁴ *Carlson v. Bellevue*, 73 Wn.2d 41, 45, 435 P.2d 957 (1968), internal cites omitted.

¹³⁵ RCW 43.21C.090, emphasis added.

clearly erroneous.¹³⁶ FOCG erroneously asserts this Court "reviews de novo whether the County has met its burden of demonstrating SEPA compliance."¹³⁷ FOCG has the burden of proof, not the County. One case FOCG cites discusses demonstration of *prima facie* SEPA compliance, but this older case was issued when SEPA lacked forms for making SEPA determinations.¹³⁸ SEPA now has such forms so there is no question as to whether SEPA review occurred. Rather, the question is one of adequacy, and FOCG has the burden of proof.

3.2. Unchallenged Findings are Verities on Appeal

It is well established that unchallenged findings of fact made by hearing examiners and in land use ordinances are verities on appeal.¹³⁹ FOCG does not address the extensive case law the County relies upon. Instead, FOCG changes the argument, asserting the RAP does not apply to

¹³⁶ *Moss v. City of Bellingham*, 109 Wn. App. 6, 13-14, 31 P.3d 703 (2001) (MDNS upheld for 172 lot subdivision); *Thornton Creek Legal Defense Fund v. Seattle*, 113 Wn. App. 34, 57-58, 52 P.3d 522 (2002).

¹³⁷ FOCG's Responsive Brief, pg. 24.

¹³⁸ *City of Bellevue v. King County Boundary Review Board*, 90 Wn.2d 856, 867, 586 P.2d 470 (1978) (DNS "did not have to conform to any particular format, as long as the record showed sufficient deliberations and consideration" and a final decision.).

¹³⁹ *Manke Lumber Co. v. Hearings Board*, 113 Wn. App. 615, 628, 53 P.3d 1011 (2002) (land use ordinance's unchallenged findings were verities on appeal); *Anderson v. Pierce County*, 86 Wn. App. 290, 307 fn. 9, 936 P.2d 432 (1997) (unchallenged examiner's findings were verities on appeal); *see also Willapa Grays Harbor Oyster Growers Ass'n v. Moby Dick Corp.*, 115 Wn. App. 417, 432-433, 62 P.3d 912 (2003); *United Development Corp. v. City of Mill Creek*, 106 Wn. App. 681, 688, 26 P.3d 943 (2001); *City of Medina v. T-Mobile USA*, 123 Wn. App. 19, 29, 95 P.3d 377 (2004); *Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 347 n. 6, 75 P.3d 1003 (2003).

it because it is not the appellant in this Court.¹⁴⁰ The County's argument is not based on FOCG's status before this Court, but its failure on its appeal to Superior Court to challenge a single finding of fact. When a superior court hears appeals of land use decisions where there have been public hearings and an extensive record has been developed, an appellant must challenge decision maker findings. Unchallenged findings of fact within an ordinance and hearing examiner decision are verities on appeal.

Yet, neither FOCG's complaint nor its summary judgment pleadings challenge the Hearing Examiner's findings as FOCG asserts.¹⁴¹ The rule applies to the complaint, not summary judgment briefing, but even that briefing does not address these findings, so cannot cure FOCG's failure.¹⁴² And, FOCG does not contend it challenged the Board of County Commissioners' findings.

There is no basis for overlooking this failure, and the single case FOCG cites to support such a result does not apply as it is based on an appellant's failure to assign error before the appellate court and challenged findings were "in fact, set forth in the ... brief."¹⁴³ Consistent with

¹⁴⁰ FOCG's Brief, pgs. 25-27.

¹⁴¹ FOCG's Brief, pg. 26.

¹⁴² See CP 1215-1306 (Plaintiffs' Amended Motion for Partial Summary Judgment); see also CP 1394-1439, 1353-67.

¹⁴³ FOCG's Reply Brief, pg. 26, FN 93, citing *Green River Cmty. College Dist. 10 v. Higher Education Pers. Bd.*, 107 Wn.2d 427, 431, 730 P.2d 653 (1986).

established precedent in appellate review of land use decisions, the Examiner's and Board's findings must be treated as verities.

3.3. SEPA: FOCG Failed to Meet its Burden of Proof

The County is planning for an additional 259 residences over a 20 year planning period. Those residences will be built regardless of County action.¹⁴⁴ The County chose predictable densities instead of a confusing mix of 1/4 acre to 20 acre lots; densities proximate to key tributaries were reduced; and setbacks along the White Salmon River were increased. As established in unchallenged Examiner findings,¹⁴⁵ this does not “substantially intensify” impacts. Having failed to challenge these findings, FOCG failed to establish significance, and the Superior Court erred by requiring yet another EIS.

3.3.1. Fish: No Significant Impacts

3.3.1.1. SEPA Review Addressed Fish Habitat

FOCG's statement that the County's SEPA review "fail[ed] to make any mention of ... fish habitat"¹⁴⁶ is false.

- The Condit EIS documents identify current and potential future fish resources.¹⁴⁷

¹⁴⁴ AR 210986 (SEPA Ex. 44, state population projections); AR 60 (Q&A Sheet); FN 12.

¹⁴⁵ AR 947-70 (findings throughout address lack of significant impacts). Included are findings addressing expected growth (2.3.6-2.3.10), water resources (section 2.6), wildlife (section 2.7), aesthetics (section 2.8), the Wild & Scenic River Management Plan (section 2.9), and farm lands (section 2.10).

¹⁴⁶ FOCG's Brief, pg. 29, emphasis removed.

¹⁴⁷ See e.g., AR 201607-16 (SEPA Ex. 5, Condit 2007 EIS); AR 202065-66 (SEPA Ex. 5, Condit 2010 EIS).

- The White Salmon River EIS extensively addresses fisheries impacts associated with residential development.¹⁴⁸
- The MDNS identifies mitigation for impacts to fish habitat, including setback and stormwater requirements.¹⁴⁹
- The Hydrologic Report identifies mitigation for fish impacts, including tributary impacts.¹⁵⁰ It also addresses dam removal, as did the Condit EIS documents.¹⁵¹
- The SEPA Addendum recognizes dam removal would improve fish habitat in the "long term," while adversely impacting it in the short term.¹⁵²

With two EIS's identifying existing and future fish resources and impacts from residential development on those resources, a supplemental hydrologic report addressing development impacts on water quality and water quantity, and an MDNS identifying mitigation for fish habitat impacts, it is a gross misrepresentation to assert the County's SEPA review does not "mention" fish.

3.3.1.2. Rezone Does not "Elevate" Water Usage

FOCG has failed to meet its burden to demonstrate the proposal has a probable, significant adverse impact on fish habitat. The rezone does not "elevate" water usage.¹⁵³ FOCG has conceded any impact on the

¹⁴⁸ AR 200314-21 (SEPA Ex. 4, White Salmon EIS), pgs. IV-1 – IV-8; *see also* AR 200139-41 (SEPA Ex. 4, White Salmon EIS), pgs. S-9 – S-11.

¹⁴⁹ AR 200113-16 (SEPA Ex. 3, MDNS); *see also* AR 210302-05 (SEPA Ex. 14, Critical Areas Ordinance).

¹⁵⁰ AR 200037-40 (SEPA Ex. 2, Hydrologic Report) (table identifying water quality and quantity mitigation).

¹⁵¹ AR 200052 (SEPA Ex. 2, Hydrologic Report); AR 200497-202119 generally, *see* specifically AR 202065-66, 201607-16 (SEPA Ex. 5, Condit Dam EIS's).

¹⁵² CP 200004 (Ex. 1, SEPA Addendum).

¹⁵³ FOCG's Brief, pg. 28.

White Salmon River is "negligible."¹⁵⁴ With regard to the tributaries, under FOCG's theory of the case, in which residential development within the area rezoned will increase (FOCG does not specify precisely how much, although it infers the increase is significant) and agricultural uses will decrease (FOCG does not specify by how much), **water usage is greater under the old zoning**. That is because agricultural uses require more water than residential uses. The County's Hydrologic Report addressed this, noting that "[i]rrigated lands typically have higher water use than residential uses."¹⁵⁵ The Report considers considerably greater residential development levels (up to 3,861 units)¹⁵⁶ than the County rezoned providing for 259 new residences.¹⁵⁷ Yet, even with denser alternatives, the report concluded there is not a single water usage impact which cannot be mitigated.¹⁵⁸ The County's expert witness, a hydrologist, calculated total water usage from the rezoned area and, in response to questioning, stated:

Q Do you see the impacts on the tributaries as significant from the proposal?

¹⁵⁴ CP 545:5-22 (TR, SEPA Hrg., December 19, 2011), pg. 213:5-22; AR 216220-21 (SEPA Ex. 176, Aquifer Test Rpts.) (FOCG's witness previously determined such withdrawals are "negligible"); AR 200065 (SEPA Ex. 2, Hydrologic Report, pg. 32).

¹⁵⁵ AR 200063 (SEPA Ex. 2, Hydrologic Report).

¹⁵⁶ AR 200079 (SEPA Ex. 2, Hydrologic Report).

¹⁵⁷ AR 210983 (SEPA Ex. 44, Staff Memo); AR 210628-46 (SEPA Ex. 22, spread sheets); AR 5 (Board Decision) Finding D-10; AR 953 (Examiner Decision) Findings 2.3.9-10; CP 697-700 (TR, SEPA Hrg., December 20, 2011), pgs. 361-64; CP 827-28 (TR, SEPA Hrg., January 23, 2012), pgs. 98-99.

¹⁵⁸ AR 200037-38, 65 (SEPA Ex. 2, Hydrologic Report); CP 550-51 (TR, SEPA Hrg., December 19, 2011), pgs. 218-19, (original analysis based on a "worst-case" build out, which will not occur).

**A No, not under the full buildout conditions or
under the parcel by parcel because of the – with
the reduction in zoning.¹⁵⁹**

The expert's analysis was based on a “worst-case” analysis in which every single new residence constructed was assumed to rely on well water. This will not be the case given the majority of the area is within the boundaries of two water systems, at least one of which is expanding its capacity.¹⁶⁰ The consultants also assumed these residences could be constructed in hydraulic continuity with a tributary. This is also unlikely given County setback requirements and Planning and Health Department review.¹⁶¹ But, even with these “worst case” assumptions, the hydrologists found impacts would not be significant.¹⁶² Consistently, Ecology confirmed that during permit reviews, “there is opportunity to consult with Ecology to confirm water can be supplied consistent with both protecting the water resource for other users and the natural environment.”¹⁶³

¹⁵⁹ CP 546:20-24 (TR, SEPA Hrg., December 19, 2011), pg. 214:20-24, emphasis added.

¹⁶⁰ AR 200012 (SEPA Ex. 1, Addendum, map of water system locations); AR 832-47 (Ecology approval of expanded water rights, January 26, 2011); AR 829-31 (City Ordinance); AR 505 (35 Fordyce Water Ass'n connections not currently drawing water).

¹⁶¹ AR 210304 (SEPA Ex. 14, Critical Areas Ordinance setbacks); AR 211046-47, 211053, 211067-68 (SEPA Ex. 46, Subdivision Code excerpts); AR 210772 (SEPA Ex. 31, Ecology comment addressing consultation).

¹⁶² CP 546:20-24 (TR, SEPA Hrg., December 19, 2011), pg. 214:20-24, emphasis added; *see also* AR 200037-40 (SEPA Ex. 2, Hydrologic Report, finding all impacts, even from much denser proposal, could be mitigated).

¹⁶³ AR 210772 (SEPA Ex. 31, Ecology December 8, 2011 comment); *see also* AR 210774 (Ex. 31, Ecology October 26, 2011 comment).

FOCG did not dispute the County's 259 figure, but failed to compute its own water consumption analysis based on this figure.¹⁶⁴ Even if FOCG's witness had presented credible testimony based on actual build-out, the County's expert analysis is well supported and is deferred to.¹⁶⁵ Further, on summary judgment, the evidence is viewed in the County's favor,¹⁶⁶ and the unchallenged Examiner findings are verities.¹⁶⁷

3.3.2. Aquifers: No Significant Impacts

FOCG has limited its argument to a single page on the leaky nature of the aquifers, which, if true, reduces rather than increases impacts. Contrary to previous analysis prepared by its own witness,¹⁶⁸ FOCG believes the shallow and deep aquifers are fully inter-connected,¹⁶⁹ meaning the shallow aquifer continually recharges the deep aquifer with precipitation. Such continual recharge eliminates withdrawal impacts.¹⁷⁰

¹⁶⁴ CP 473:3-7 (TR, SEPA Hrg., December 19, 2011), pg. 141:3-7, (impact assessment based on "full buildout"), CP 453:18 (pg. 121:18) (based on "a significant buildout").

¹⁶⁵ Where there is "conflicting expert opinion" the agency, not the court, resolves the differences. *City of Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 40, 988 P.2d 27 (1999), *see also* County's Opening Brief, section 5.1.3.

¹⁶⁶ *CLEAN v. City of Spokane*, 133 Wn.2d 455, 462, 947 P.2d 1169 (1997) ("the court shall consider the evidence in the light most favorable to the nonmoving party.")

¹⁶⁷ AR 962-65 (Examiner Decision), Findings 2.6.3.1- 2.6.3.3 (River flows), Findings 2.6.5.1 - 2.6.5.5 (tributary impacts), and Findings 2.6.7.1 - 2.6.7.3 (White Salmon River EIS addresses impacts). The findings address water quantity and quality.

¹⁶⁸ AR 548-49 (This "**interpretation is not supported by previous investigations including those by Mr. Yinger himself,**" who previously determined "[t]he CRBG aquifers are generally considered to be confined."), emphasis in text.

¹⁶⁹ FOCG's Response Brief, pg. 51.

¹⁷⁰ CP 617-19, 636:4-8 (TR, SEPA Hrg., December 20, 2011), pgs. 281-83, and pg. 300:4-8 ("**It wouldn't be significant or measurable**" due to the "**abundant recharge area that exists for the upper aquifer.**"), emphasis added.

The County's consultants were concerned that caution should be used in drilling into deeper aquifers with compartmentalization, as withdrawals are harder to mitigate.¹⁷¹ "Compartmentalization" is not a theory generated so the County could take the position that "interference between new wells" was eliminated, as FOCG asserts without support.¹⁷² It is instead a more conservative, precautionary approach. But, regardless of which witness is correct, impacts are not significant.

Examiner: So if you assume for the sake of the argument that Mr. Yinger is completely correct about the recharge from the upper to the lower ... you are still of the opinion that the recharge of the upper aquifer, in part due to the hydraulic continuity with the river, is more than adequate to accommodate even the full buildout potential under existing zoning plus whatever recharge --

Witness: Yes.

Examiner: -- is occurring from upper to lower.

Witness: Yes.

This is addressed in unchallenged findings, which are supported by several pages of expert witness responses to extensive questioning.¹⁷³

¹⁷¹ AR 200034-35 (SEPA Ex. 2, Hydrologic Report).

¹⁷² FOCG's Brief, pg. 51.

¹⁷³ CP 558-64 (TR, December 19, 2011), pgs. 226-31; CP 962-63 (Examiner's Decision, Findings 2.6.3.2-.3, 2.6.4.1-.4).

3.3.3. Wildlife: No Significant Impacts

FOCG has failed to meet its burden of proof to demonstrate the County's action has probable, significant adverse impacts on wildlife. During the administrative hearing, FOCG failed to identify wildlife of concern other than by passing reference, and did not identify the biological components required for that wildlife which the County's proposal impacts.¹⁷⁴ Further, wildlife impacts are mitigated through the Critical Areas Ordinance, which protects fish and wildlife habitat conservation areas.¹⁷⁵ It requires analysis, setback delineations, and other performance measures. Development must **"avoid probable, significant adverse impacts to the conservation area and to protect the functions and values of the conservation area...."**¹⁷⁶ The notion that only if WDFW has mapped habitat will it be protected, is false. In addition to WDFW consultation, "[a]ll sites which maintain critical fish/wildlife habitat conservation areas, which are not mapped, shall be subject to critical fish/wildlife habitat conservation area review."¹⁷⁷ The unchallenged Examiner findings address these issues in detail.¹⁷⁸

¹⁷⁴ AR 966-68 (Examiner's Decision), Findings 2.7.1-2.7.6, *see* Finding 2.7.1 (FOCG "raised general concerns"); AR 999 (FOCG's Opening Brief filed with the Hearing Examiner had two sentences on wildlife impacts); AR 1091-92 (FOCG's post-hearing reply briefing had six sentences on wildlife impacts).

¹⁷⁵ AR 210302-05 (SEPA Ex. 14, Critical Areas Ordinance).

¹⁷⁶ AR 210304 (SEPA Ex. 14, Critical Areas Ordinance), *emphasis added*.

¹⁷⁷ AR 210303 (Ex. 14, Critical Areas Ordinance).

¹⁷⁸ AR 966-68 (Examiner Decision), Findings 2.7.1-2.7.6; *see also* AR 210769-71 (SEPA Ex. 31, WDFW Comment, October 25 and December 5, 2011).

FOCG cannot meet its burden of proof by relying on dated agency comment based on a misunderstanding of County zoning and by incorrectly taking the position that the County has the burden of proof.¹⁷⁹ Instead of addressing how FOCG, before the Examiner, met its burden to demonstrate a significant impact to a specifically identified species, FOCG broadly references the presence of elk and deer winter range, the western gray squirrel, and oak woodlands.¹⁸⁰ FOCG does not explain how the County's proposal adversely impacts these species and habitat other than to broadly assert, based on dated WDFW comment, that increased densities adversely impact wildlife.¹⁸¹ However, later WDFW comment explained the County's proposal improves upon the existing regulatory structure and better protects wildlife.¹⁸²

With respect to the County's broader planning efforts through the FDR (Focused Development Program),¹⁸³ two components have been implemented. Increasing River setbacks by 100 feet and mitigation for multiple Resource Lands evaluations is required by regulation so cannot be "speculative."¹⁸⁴ The third component, habitat banking, requires property owner participation, but is already authorized by regulation as mitigation.¹⁸⁵ County implementation will build on the work which has

¹⁷⁹ FOCG's Brief, pg. 37; *see* section 2.2 of this brief.

¹⁸⁰ FOCG's Brief, pg. 37.

¹⁸¹ FOCG's Brief, pgs. 37-39; *see* section 2.2 of this brief.

¹⁸² Section 2.2 of this brief; *see also* AR 210769-71 (SEPA Ex. 31).

¹⁸³ *See e.g.*, AR 200015 (SEPA Ex. 1, Addendum) (summarizes mitigation).

¹⁸⁴ AR 48 (KCC 19.54A.020(B)); AR 47 (KCC 19.53.120); FOCG's Brief, pg. 39.

¹⁸⁵ AR 210297 (SEPA Ex. 14), *see* definition of "mitigation."

already occurred.¹⁸⁶ FOCG has not met its burden of proof to demonstrate there are probable, significant adverse wildlife impacts. To the contrary, wildlife habitat protections have improved.

3.3.4. SEPA Review "Accounts for" Federal Law and the River

Klickitat County took "into account" whether the rezone may "to a significant degree ... [c]onflict with ... federal laws or requirements for the protection of the environment," or "adversely affect" the White Salmon River.¹⁸⁷

The Management Plan, a 23-year-old policy document, is not a federal law or requirement. The Hearing Examiner agreed,¹⁸⁸ and even the U.S. Forest Service acknowledged, "[t]he only way the Forest Service can exercise authority over land within the boundary which remains in private ownership is by purchasing rights...."¹⁸⁹ This document is also outdated. The Plan states it is to be "revised on a 10-year cycle, or at least every fifteen years," but in 23 years it has not once been revisited.¹⁹⁰ Management Plan boundaries were not even finalized until year end 2012,

¹⁸⁶ See AR 53 (Resolution 08612), outlining next steps; AR 215696-871 (SEPA Ex. 150, American Farmland Trust report, titled *Keeping Farmland Available for Klickitat County Agriculture: Report to the Klickitat County Planning Commission*).

¹⁸⁷ WAC 197-11-330(3)(e)(i) and (iii).

¹⁸⁸ AR 969, Finding 2.9.2 ("The Management Plan is not a regulatory document....").

¹⁸⁹ AR 200466 (SEPA Ex. 4, Management Plan), pg. III-2, AR 200467 (absent federal ownership, "the federal government does not have authority to regulate what happens on private land").

¹⁹⁰ AR 200468 (Management Plan), pg. III-4; AR 200439 (Plan adopted in 1991).

after the County's action.¹⁹¹ Also, the Forest Service never made the land acquisitions identified as **"one of the key features in making this a workable plan."**¹⁹² Rather than being a "federal law" or a "requirement," the Plan is a dated, largely unimplemented, 23-year-old policy document.

As this policy document is not a federal law or requirement, the County did not even have to consider it. Nevertheless, in completing its SEPA review, the County took both the Plan and River "into account." FOCG has failed to meet its burden to demonstrate that due to a federal law or requirement or River presence, the County's legislation creates significant impacts.

As the Hearing Examiner determined in unchallenged findings, the County considered the River's federal designation and the Management Plan, and even if consistency were required, there is no conflict. Within Management Plan boundaries, zoning loopholes are closed and aesthetic protections increased.¹⁹³ The Examiner addressed the rezone's River setback increase, along with impacts to water quality, water quantity, tributaries, and aesthetics.¹⁹⁴ FOCG downplays these findings, erroneously characterizing them as "legal conclusions,"¹⁹⁵ although they are clearly

¹⁹¹ 77 FR 60101, Oct. 2, 2012 (boundary "not effective" for 90 days); AR 200444 (After Congress reviews, "a detailed map" of management area locations "will be prepared.")

¹⁹² AR 200467 (Management Plan), pg. III-3.

¹⁹³ AR 969 (Examiner Decision), Findings 2.9.1-4; *see also* sections 2.2, 2.3, and 2.7 of this brief, along with below argument.

¹⁹⁴ AR 969 (Examiner Decision), Findings 2.9.1.-2.9.4; *see also* AR 951, 955 (Examiner Decision), Findings 2.3.2 and 2.5.1; AR 200011 (SEPA Ex. 1, Addendum), map showing acreage removed from rezone alongside the White Salmon River.

¹⁹⁵ FOCG's Brief, pg. 46.

demarcated as "findings," with conclusions on the same issue later on in the document.¹⁹⁶ As evidenced by a decision replete with Administrative Record citations, the Examiner had substantial Record support. FOCG, as with all other issues, distorts this Record.

FOCG asserts the River is significant as it "has the longest vertical-wall gorge in the region, extending from Trout Lake to BZ Corner...."¹⁹⁷ The County's rezone is largely located below this section of the River. In fact, with the rezone, the RR2 designation was pulled south about half a mile, and replaced with a now more restrictive Resource Lands zone.¹⁹⁸ This reduced densities along a half mile of the River at BZ Corner. In Husum, once the overlay expired two years ago, the zoning along the River remains the same (Resource Lands), but the code requirements are now more stringent.¹⁹⁹

With respect to fish habitat, FOCG asserts, "[t]he River's resident fish population is considered one of the State's most important, and the River is known for its habitat quality, diversity of species, abundance, and

¹⁹⁶ AR 976-77 (Examiner Decision), Conclusions 3.5.1-3.5.4.

¹⁹⁷ FOCG's Brief, pg. 7.

¹⁹⁸ Compare AR 200103 with AR 200104 (SEPA Ex. 2, Hydrologic Report, maps showing existing and proposed zoning); *see also* AR 12, at Appendix 1 (zoning map).

¹⁹⁹ *See* section 2.7 of this brief explaining the stricter Resource Lands zoning. *Also see* the zoning map at AR 12. The color version is Appendix 1 to this brief.

size of fish."²⁰⁰ The fish referred to here are trout, one species of which is now considered invasive,²⁰¹ and the Plan acknowledges that "[d]ue to the presence of Condit Dam, there are no anadromous fish runs in the river at this time."²⁰² FOCG also overplays River significance for ESA recovery, asserting "[a]t least four species listed as threatened under the ESA depend on the habitat provided by the River and its tributaries, springs and seeps."²⁰³ However, the federal government has classified the Middle Columbia River steelhead distinct population segment as extinct, and other salmon units as "extirpated or nearly so."²⁰⁴ Thus, the River is, for the most part, not being relied upon for ESA species recovery.²⁰⁵ Even so, as unchallenged Examiner findings set forth, by decreasing densities in key areas, increasing River setbacks, and making zoning more restrictive alongside the River, the County has protected the River as if it were.²⁰⁶

²⁰⁰ FOCG's Brief, pgs. 7-8.

²⁰¹ AR 200447 (Management Plan), pg. I-4.

²⁰² AR 200445 (Management Plan), pg. I-2.

²⁰³ FOCG's Brief, pg. 8.

²⁰⁴ AR 576.

²⁰⁵ AR 576. NMFS classified the Middle Columbia River steelhead as extinct, and the River is not needed for DPS viability. The Lower Columbia River Chinook salmon ESU was classified as "extirpated or nearly so." This is the same for 28 of 32 historical Columbia Chinook salmon ESU populations and 14 of 17 Columbia River chum salmon ESU populations, including White Salmon River populations. AR 576; AR 210990 (SEPA Ex. 45).

²⁰⁶ See County's Opening Brief, pgs. 34-35, citing to AR 969 (Examiner's Decision), Findings 2.9.1 - 2.9.4; *see also* sections 1, 2.2-2.5, and 2.7.

The County “accounted for” the River and Management Plan, and FOCG has failed to meet its burden to show otherwise.

3.3.5. Road Impacts: FOCG Relegates the Issue to a Footnote

FOCG failed to raise its issue on fish impacts from stormwater runoff associated with road construction before the Examiner. Having failed to exhaust its administrative remedies, FOCG may not raise the issue now.²⁰⁷ Instead of addressing this argument, FOCG abandons it, relegating the issue to a footnote.²⁰⁸ In that footnote, FOCG cites to one page from a draft recovery plan noting roads can adversely impact fish habitat, without establishing how the rezone creates new roads which will adversely impact that habitat. The rezone does not significantly increase residential development levels (the 259 new homes will be built regardless of County action), is located along a major highway so as to minimize new road construction, and is fully mitigated.²⁰⁹ Further, the State Department of Licensing, Geologist Licensing Board, found the County expert's stormwater modeling approach "likely more conservative" than that of FOCG's consultant, who had filed a complaint against County

²⁰⁷ *CLEAN v. City of Spokane*, 133 Wn.2d 455, 465, 947 P.2d 1169 (1997).

²⁰⁸ See FOCG's Response Brief, pg. 31, FN 109.

²⁰⁹ AR 200022-24 (SEPA Ex. 1, Addendum, summary of regulatory environment); AR 210281-309 (SEPA Ex. 14, Critical Areas Ordinance); AR 210998-211034, AR 211036-93 (SEPA Ex. 46, subdivision requirements); AR 211095-156 (SEPA Ex. 46, road construction requirements).

witnesses.²¹⁰ Even if FOCG had exhausted its administrative remedies and not abandoned this argument, it cannot meet its burden of proof.

3.3.6. More Mitigation than SEPA Requires

Without a probable, significant adverse impact, no mitigation is required. Nonetheless, mitigation is extensive. The County Ordinance required White Salmon River setbacks, slowed Resource Lands division through mitigation requirements, removed 209 acres from the Proposal, reduced densities along the Rattlesnake and Indian Creek tributaries, pulled land from the rezone along the River and reduced densities along the River in BZ Corner.²¹¹ Further, the rezone is located mostly within the boundaries of the two largest water suppliers in the area,²¹² at least one of which is expanding its water rights,²¹³ providing further mitigation.²¹⁴ And, the limited water withdrawal with the rezone, which is likely less than maintaining the preexisting zoning, is further mitigated through local and state²¹⁵ requirements to confirm water supply adequacy during permit

²¹⁰ AR 942.

²¹¹ See sections 1, 2.7 and 3.3.4; AR 200006 (SEPA Ex. 1). AR 200011 (map showing acreage removed); AR 200042 (SEPA Ex. 2, Hydrologic Report, property within Scenic Area originally included but later removed); AR 47-48 (Ordinance, Ch. 19.54A); AR 6 (Ordinance, Findings E-3 - E-5).

²¹² AR 200012 (SEPA Ex. 2, Addendum, map of water service boundaries).

²¹³ CP 547 (TR, SEPA Hrg., December 19, 2011), pg. 215:18-19; City has "now enlarged their water right"; see also CP 700-1 (TR, SEPA Hrg., December 20, 2011), pgs. 364-65.

²¹⁴ AR 200052 (SEPA Ex. 2, Hydrologic Report) (88 of Fordyce's 125 approved connections are in use); AR 550-51 (TR, SEPA Hrg., December 19, 2011), pgs. 218-19 (analysis conservative and based on improbably high growth scenarios).

²¹⁵ RCW 19.27.097 and RCW 58.17.110(2) (evidence of potable water supply required); AR 211053, 67-68, and, generally, AR 211036-93 (SEPA Ex. 46, plat requirements).

review, as Ecology noted.²¹⁶ This is coupled with resource regulations (*i.e.*, Critical Areas Ordinance, Shoreline Master Program, subdivision regulations, stormwater regulations, water quality monitoring requirements, etc.).²¹⁷ In addition, although not required, the County outlined mitigation through the Resolution. The banking program requires further development. But, as the Examiner found, the mitigation is capable of being accomplished:

WDFW comment indicates such mitigation is feasible here, and would provide an approach for improving mitigation strategies on a "more regional scale." The County has outlined the steps to be taken in developing the Program; indicated it will continue to consult with relevant state agencies during program development; and has committed to the outlined mitigation.²¹⁸

These findings are now verities on appeal. The County went to extraordinary effort to develop mitigation for not only this proposal, but to plan ahead to preserve its natural resource base. There is no SEPA requirement for mitigation to be finalized up front,²¹⁹ and FOCG failed to demonstrate the mitigation was infeasible. Moreover, without identifying

²¹⁶ AR 210772-73 (SEPA Ex. 31, Ecology comment, December 8, 2011), *see also* October 26, 2011 comment at AR 210774).

²¹⁷ *See* AR 210979-81 (SEPA Ex. 43, County Memo - Planning History); AR 210281-309 (SEPA Ex. 14, Critical Areas Ordinance); AR 210998-211034 (SEPA Ex. 46, County Health Department regulations); AR 211036-93 (SEPA Ex. 46, County plat requirements); AR 211095-156 (SEPA Ex. 46, County road construction requirements).

²¹⁸ AR 955-56 (Examiner Decision), Findings 2.5.1, 2.5.2, and 2.5.4.

²¹⁹ *See e.g., West 514, Inc. v. Spokane County*, 53 Wn. App. 838, 848-49, 770 P.2d 1065 (1989) (use of earlier EIS coupled with MDNS requiring further analysis upheld).

a probable, significant adverse impact, FOCG failed to demonstrate it was even required mitigation.

3.3.7. SEPA does not Require an "MDNS Alternatives Analysis"

FOCG fails to address its concession to the Hearing Examiner that SEPA does not require an MDNS to include alternatives.

Q Do you agree that, as a matter of law, when an MDNS is required, that there does not need to be consideration of -- or that consideration of alternatives are not legally required?

A That is correct, yes. I've never stated otherwise in any of my briefing.²²⁰

Having conceded the issue before the Examiner,²²¹ FOCG is now precluded from arguing otherwise.²²² Even if FOCG could raise the issue, FOCG's concession is consistent with SEPA. SEPA has general language providing for government to "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."²²³ But outside of an EIS, there is no requirement to include alternatives, as the SEPA regulations acknowledge by not requiring an

²²⁰ CP 828:11-16 (TR, SEPA Hrg., January 23, 2012), pg. 99:11-16, emphasis added.

²²¹ See AR 980-1005, 1073-1102 (FOCG also did not brief this issue).

²²² *CLEAN v. City of Spokane*, 133 Wn.2d 455, 465, 947 P.2d 1169 (1997) (exhaustion of administrative remedies in a SEPA case is required).

²²³ RCW 43.21C.030(2)(e).

alternatives analysis in the required DNS form, which the County utilized in issuing the MDNS.²²⁴

Nonetheless, the County considered alternatives, including proposal location. FOCG does not address the County's removal of 413 acres from the proposal,²²⁵ the increased setbacks,²²⁶ County's ongoing attention to protecting its water resources,²²⁷ the proposal's regulatory revisions, or the alternatives analysis in the SEPA Addendum and the White Salmon River EIS, which evaluated six alternative development scenarios.²²⁸ Contrary to FOCG's assertions, the County identified the White Salmon EIS six "Build-Out Scenarios" as meeting any requirement to consider alternatives in both its Opening Brief and in Superior Court.²²⁹ As a result of this analysis, along with agency consultation, and mediation, the County considered and committed to a variety of mitigation options.²³⁰

²²⁴ WAC 197-11-970.

²²⁵ AR 200005 (SEPA Ex. 1, Addendum), last para.; AR 200011 (maps showing acreage removed); AR 200042 (SEPA Ex. 2, Hydrologic Report) (property within Scenic Area originally included in the rezone, but later removed).

²²⁶ AR 47-48 (Ordinance), Ch. 19.54A; AR 6 (Ordinance), Findings E-3 - E-5.

²²⁷ See e.g., AR 20037-40 (SEPA Ex. 2, Hydrologic Report, identifying mitigation); AR 210979-81 (SEPA Ex. 43, memo on regulatory structure); AR 210781 (SEPA Ex. 31, Health Dept. Memo on monitoring); CP 595-608 (TR, SEPA Hrg., December 19, 2011, County Env. Health Dir. testimony), pgs. 263-76; AR 7 (Ordinance), Finding E-9, addressing density reductions near tributaries; CP 634-36 (TR, SEPA Hrg., December 20, 2011), pgs. 298-300.

²²⁸ AR 200125-496 (SEPA Ex. 4, White Salmon EIS), maps of alternatives attached to EIS at AR 200491-96, summary of alternatives at AR 200135-41 (pgs. S-5 – S-11).

²²⁹ FOCG's Brief, FN 230; See CP 1336 (Klickitat County's Opposition to Friends' Amended Motion for Summary Judgment, pg. 26); County's Opening Brief, pg. 34, including FN 143.

²³⁰ See e.g., AR 3 (Ordinance), Finding C-3, cultural resource protections; AR 6 (Ordinance), Findings E-4, E-5, River protections; AR 7 (Ordinance), Finding E-9, tributary protections; AR 47-48 (Ordinance, addressing setback requirement); AR 53-57 (Resolution, committing to further mitigation).

Further, the County adopted new cultural resource protections via settlement agreement,²³¹ and even debated whether it was worth it to plan at all, given planning in Klickitat is largely voluntary.²³² Thus, although not required in an MDNS (as FOCG conceded), the County considered alternatives.

3.3.8. EIS Disclosed Impacts

Even if FOCG had been able to establish the County's legislation has unmitigated, probable, significant adverse impacts, FOCG failed to demonstrate that the County's four incorporated EIS's did not disclose impacts flowing from residential development.

Incorporation is not an "implicit recognition" that there are significant impacts.²³³ Rather, it is a tool SEPA encourages local governments to use. "Agencies should use existing studies and incorporate material by reference whenever appropriate."²³⁴ Documents incorporated may be on proposals which are "the same as, or different than, those analyzed in the existing documents."²³⁵ FOCG completely misses the point of incorporation.

The County incorporated the Condit Dam removal EIS's not because federal and state agencies had assessed the County's rezone

²³¹ AR 855-62 (Ordinance O011712, adopting cultural resource protections); *see also* AR 200019-20 (SEPA Ex. 1) and AR 210783-86 (SEPA Ex. 32).

²³² AR 60 (Q&A Sheet); AR 199 (Fact Sheet).

²³³ FOCG's Brief, pg. 32.

²³⁴ WAC 197-11-635(1).

²³⁵ WAC 197-11-600(2).

proposal, but because these documents contain information on the environmental conditions within and surrounding the area rezoned. FOCG uses an excerpted MDNS quotation to misleadingly assert the County believes the Condit EIS's evaluated County rezone proposal alternatives.²³⁶ However, the MDNS, at that section, is not describing the County rezone, but the content of the dam removal documents, including their analysis on alternatives to dam removal.²³⁷ This depiction of EIS contents is consistent with SEPA requirements, which require incorporated materials to "be cited, [their] ... location identified, and ... relevant content briefly described...."²³⁸ Incorporating these documents for the data they contain is not a "post-hoc rationalization."²³⁹ The Condit Dam removal documents identify fish and wildlife resources located not in some other watershed, but along the White Salmon River.²⁴⁰

The White Salmon River EIS assesses six alternative development scenarios within the exact area rezoned.²⁴¹ It addresses impacts potentially associated with residential development, including stormwater

²³⁶ FOCG's Brief, p. 33.

²³⁷ AR 200110 (Ex. 3, MDNS). (FOCG's Brief, at FN 118, cites to AR 200100, the correct AR citation is 200110.).

²³⁸ WAC 197-11-635(2).

²³⁹ FOCG's Response Brief, pg. 34, FN 119.

²⁴⁰ AR 202065 (SEPA Ex. 5, 2010 Condit EIS document) ("The affected environment for aquatic resources includes ... **the White Salmon River and its tributaries** above Condit Dam up to where salmonids can be expected to migrate."), emphasis added.

²⁴¹ The EIS evaluates impacts on thousands of homes within the area rezoned. AR 200359-361 (SEPA Ex. 4, White Salmon EIS), pg. IV-46 – IV-48, *see also* AR 200139-41 (pgs. S-9 - S-11) (summary of analysis).

impacts, aesthetics, fish and wildlife habitat, and water usage.²⁴² These are all impacts the County identified, addressed, and mitigated.²⁴³

In one respect, though, FOCG is correct - the EIS does not evaluate the "residential sprawl that is likely to occur under the Rezone."²⁴⁴ That is because the proposal is not creating sprawl. 259 residences over 20 years simply is not sprawl. That term has no meaning in this rural community. There is no such thing as "sprawl" here - that is a term used to describe poor planning in urbanized areas. This is a rural area. If one really dissects FOCG's argument, it is this: from the vantage point of this advocacy group, located in urbanized Portland, the County must keep these 50,000 acres as a pristine landscape, with no development. FOCG wants to tell its donors that it has obtained for them a national park in their backyard. However, FOCG is not prepared to pay for it, and will not work with local farmers, ranchers, and those working in local forests. FOCG will instead accomplish its goal of effectively expanding the boundaries of the Columbia River Gorge National Scenic Area,²⁴⁵ which takes up a significant portion of land within Klickitat County, through the more

²⁴² AR 200129-30, 139-41, and 200368-70 (SEPA Ex. 4, White Salmon EIS, Table of Contents and also tables summarizing impacts at pgs. S-9 - S-11, and IV-57 - IV-59). *See also*, AR 200212, 215-16, 222, 226, 319-27 (fish and wildlife); AR 200207, 208, 210 (water resources); AR 200244, 293-94, 343-52 (aesthetics).

²⁴³ *See* sections 3.3.6 (mitigation), 2.7 (zoning improvements), and 2.2- 2.4 (fish habitat).

²⁴⁴ FOCG's Brief, pg. 34.

²⁴⁵ Even within that area, development is tightly regulated, but not prohibited. 16 U.S.C. § 544a (Act's dual purposes are protecting Gorge resources and supporting economic development); 16 U.S.C. § 544d(b) (land use regulation provisions); AR 201610 (SEPA Ex. 5, Condit EIS 2007 document, depicts Scenic Area located below rezone area).

expeditious path of least resistance - litigation against an economically challenged rural jurisdiction.²⁴⁶

What FOCG really wants is a cap on growth, given its objection to planning for just 259 residential units over 20 years. Through this litigation, FOCG seeks a de facto moratorium.²⁴⁷ But, no law in Washington caps or even meters growth. What is done in Washington, is to "plan" for it, hence the terms "Planning **Enabling** Act" and "Growth **Management** Act." That is precisely what Klickitat County did. What, in its overzealous advocacy, FOCG does not realize, is that capping growth is not possible. With no planning, growth happens anyway. The only difference is that its impacts are worse.

Regardless of party objectives, SEPA does not dictate results. As long as probable, significant adverse impacts were either disclosed or mitigated, that is all SEPA requires. With the White Salmon River EIS, impacts from growth are disclosed. Contrary to FOCG's continual misrepresentations, the White Salmon River EIS evaluates impacts from the development of **thousands** of homes in the area, far beyond the

²⁴⁶ The County has long faced economic challenges. The situation has improved, but the White Salmon EIS noted the high unemployment rates which have plagued the County for decades. The "County has historically had one of the highest unemployment rates in the state of Washington." AR 200305 (SEPA Ex. 4, White Salmon EIS), pg. III-55.

²⁴⁷ FOCG has suggested densities typical of an urbanized city could be placed in limited areas, although government services are inadequate, and this would not be marketable or compatible with the rural surroundings.

several hundred planned for by 2030.²⁴⁸ To plan for just 259 additional residences, the County has done far more than SEPA requires.

3.4. No Independent Constitutional Claims Argued

FOCG's amended complaint included several constitutional claims.²⁴⁹ FOCG, with its responsive briefing, abandons any separate due process, equal protection, and federal separation of powers claims, leaving only a spot rezone claim.²⁵⁰ However, as these constitutional claims were separately pled, it was error for the Court not to dismiss them and this Court should direct entry in the County's favor.

3.5. The County Adopted the Rezone: It did not Delegate Legislation

FOCG does not address the County's argument that FOCG invited the Superior Court to dismiss its unlawful delegation claim on the Resolution.²⁵¹ As such, FOCG has abandoned that claim.²⁵² With respect to the Ordinance, FOCG does not explain how a property owner can rezone land when the Board adopted the rezone.²⁵³ As with any other zoning ordinance, it is up to the property owner to determine whether to

²⁴⁸ AR 60 (601 residences are currently present).

²⁴⁹ CP 295, ¶ 90; CP 298-99, ¶¶ 99-100; CP 301, ¶ 112-13; CP 302-03, ¶¶ 5-6.

²⁵⁰ FOCG's Brief, pgs. 62-63, including FN 233.

²⁵¹ TR 76:3-8 (Summary Judgment Hrg., February 28, 2013) ("**Plaintiff submits this Court can dismiss the unlawful delegation claim with respect to the FFR [Resolution] without prejudice.** We are not conceding that it will be implemented lawfully, constitutionally in any way, shape or form. Remains to be seen.").

²⁵² *Seattle School District No. 1 v. State*, 90 Wn.2d 476, 488, 585 P.2d 71 (1978), superseded by statute on other grounds (failure to present argument results in its abandonment).

²⁵³ AR 10 (Ordinance).

submit an application to vest to existing regulations to develop property under the new zoning. Because the Board of County Commissioners made these legislative decisions, County action was consistent with RCW 36.70.650, which provides for the Board to adopt rezones. Even if FOCG had addressed the County's arguments, there was no Ch. 36.70 RCW violation, and summary judgment should be directed in the County's favor.

3.6. No Spot Rezone

3.6.1. FOCG has the Burden of Proof

FOCG has the burden to show the legislation is arbitrary and capricious. Yet, with respect to its Comprehensive Plan consistency allegations, FOCG states "In other words, the County has not shown consistency with this requirement."²⁵⁴ Similarly, FOCG asserts "the County has not provided adequate justification that the RR2 Overlay bears a substantial relationship to the public health, safety, general welfare, or morals."²⁵⁵ This is not the test. FOCG has the burden of proof to show the legislation is arbitrary and capricious. FOCG has failed to.

3.6.2. Surrounding Zoning is Virtually Identical to Overlay

Spot zoning can only occur where there are dramatically divergent zones, in which "a smaller area is singled out ... and specially zoned for a

²⁵⁴ FOCG's Brief, pg. 67.

²⁵⁵ FOCG's Brief, pgs. 65-66.

use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan."²⁵⁶ The County located the RR2 Overlay in an area surrounded by RR2 and RL zoning, both of which allow residential uses. In fact, the surrounding RR2 zoning allows **exactly** the same uses and densities.²⁵⁷

The only distinction between RR2 and the RR2 Overlay is the added setback. With the Overlay, a landowner is required to add 100 feet of setback from the White Salmon River.²⁵⁸ FOCG asserts the benefit is a "mirage" as 200 foot setbacks are already required.²⁵⁹ FOCG has not read the regulations. The regulations state that whatever the existing setback is, 100 feet are added.²⁶⁰ Thus, the only difference between the RR2 Overlay proximate to the River and the surrounding RR2 zone is the increased setback. That is not a spot rezone. And, in any event, the RR2 Overlay was adopted on a pilot basis and sunset two years ago.²⁶¹

²⁵⁶ *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363, 368-70, 662 P.2d 816 (1983) (light manufacturing within industrial park surrounded by residential uses was not an illegal spot rezone); *see also Murden Cove Preservation Ass'n v. Kitsap County*, 41 Wn. App. 515, 520-21, 704 P.2d 1242 (1985).

²⁵⁷ AR 48 (KCC 19.54A.020(A)).

²⁵⁸ AR 48 (KCC 19.54A.020).

²⁵⁹ FOCG's Brief, pg. 66.

²⁶⁰ AR 48 (KCC 19.54A.020(B) (properties developing under the RR2 Overlay "are subject to ... an added 100-foot White Salmon River setback.")).

²⁶¹ AR 47 (KCC 19.54A.010).

3.6.3. Increasing River Setbacks is not "Illegal"

Not all spot zones are necessarily problematic. They are only remanded if also “illegal.”²⁶² A zoning district is not illegal unless “the spot zone grants a discriminatory benefit to one or a group of owners to the detriment of their neighbors or the community at large without adequate public advantage....”²⁶³ The Overlay zone does not. It applied uniformly to all properties. In unchallenged findings, the County determined it was in the public interest to enact RR2 zoning on a pilot basis.²⁶⁴ The zoning protected the River while planning for growth. As set forth in unchallenged Board of County Commissioner findings, it was designed to balance property rights with environmental protections,²⁶⁵ an approach the appellate courts support.²⁶⁶ With the Overlay, the County leveraged a setback increase to further protect the White Salmon River, when it expanded RR2 zoning on a pilot basis in an area planned for modest growth.²⁶⁷ That is not “illegal,” and, in any case, the zoning has sunset.

²⁶² *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d at 368.

²⁶³ *Id.*

²⁶⁴ AR 6 (Ordinance), Findings E-2 – E-8, see also AR 9, Finding J-4 (legislation in “public interest”).

²⁶⁵ County's Opening Brief, pgs. 38-39, citing to AR 6 (Ordinance), Findings E-2 - E-8.

²⁶⁶ *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d at 369.

²⁶⁷ AR 6 (Ordinance), Findings E-2 - E-8.

3.6.4. The Rezone is Consistent With the Comprehensive Plan

County zoning legislation is consistent with the Comprehensive Plan. There are many ways to implement the Plan²⁶⁸ and all policies FOCG identifies use the word "should," not "shall," affording the County wide discretion.²⁶⁹ FOCG attempts to place the burden on the County, when FOCG has the burden to show arbitrary and capricious Plan implementation.

The Plan provides that "[g]enerally, unsewered areas with **severe soil limitations** for development **should** not be developed at a density greater than one unit per five acres."²⁷⁰ FOCG fails to address the County's argument that the Plan identifies the area as generally suitable for residential development,²⁷¹ instead arguing it is the County's duty to "disclose or identify" areas with severe soil limitation and that "the County has not shown consistency with this requirement."²⁷² As FOCG has the burden of proof, that is not the County's duty. But, even if it were, 98% of the soils in the rezoned area are hydrologic Group B soils, which **"typically have moderate to rapid infiltration rates and produce little runoff."**²⁷³ There is no inconsistency.

²⁶⁸ See e.g., *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d at 371.

²⁶⁹ See e.g., FOCG's Brief, pg. 66, FN 245.

²⁷⁰ AR 209958 (SEPA Ex. 12, Comprehensive Plan, p. 29), emphasis added.

²⁷¹ See e.g., AR 209936, 209940, and CP 1208, correcting AR 209942A (SEPA Ex. 12, Comprehensive Plan), pgs. 16, 17, and 20), *see also* AR 25-26, and 29 (Comprehensive Plan plans for appropriately sited residential development in the area).

²⁷² FOCG's Brief, pg. 67.

²⁷³ AR 200046-47 (SEPA Ex. 2, Hydrologic Report), emphasis added. The Report discusses area soil conditions as part of the stormwater modeling analysis.

Further, FOCG entirely fails to address the County's argument that County regulations prohibit development in areas with severe soil limitations. FOCG instead mischaracterizes the County's explanation of local health code requirements as being legal "counsel's post-hoc rationalization about future site-specific compliance with state health codes"²⁷⁴ and asserts "this rationale is nowhere to be found in the County's own decision-making process."²⁷⁵ There is nothing "post-hoc" about the County analysis and the Record is replete with factual support, as the Board of County Commissioners and Examiner both addressed.

Klickitat County has adopted Ch. 246-272A WAC, including well protection measures codified at Ch. 8.10 KCC. These regulations were approved by the State Department of Health on January 7, 2011.

County Code Ch. 8.10, includes about 35 pages of septic system design requirements, designed to "[l]imit the discharge of contaminants to waters of the state" and avoid "[a]dverse effects to public health that discharges from on-site sewage systems may have on ground and surface waters."²⁷⁶

Two pages of Hearing Examiner findings address these requirements.²⁷⁷

The findings are based on the County Health Code filed with the Examiner and County Environmental Health Director expert testimony.²⁷⁸ Even if

²⁷⁴ FOCG's Brief, pg. 67, FN 251.

²⁷⁵ FOCG's Brief, pg. 67, FN 251.

²⁷⁶ AR 7 (Ordinance), p. 7, Findings F-2 and F-3, *see also* Findings F-4 - F-6.

²⁷⁷ AR 960-61 (Hearing Examiner's SEPA Decision), Findings 2.6.2.7-.9.

²⁷⁸ CP 595-608 (TR, SEPA Hrg., December 19, 2011), pgs. 263-76. The Director established his expertise on septic system regulation. He holds degrees in microbiology and environmental chemistry, and is licensed for inspection duties consistent with State Departments of Licensing and Health requirements. CP 595-96.

98% of the soils were not well drained, development is prohibited in areas with severe soil limitations. County action goes far beyond the bare Plan policy FOCG relies upon.

The Plan states "[f]uture growth **should** occur primarily in the existing urban centers and rural communities. Rural areas **should** be developed at low densities."²⁷⁹ As addressed in unchallenged findings, the County is planning for growth in Husum and BZ Corner.²⁸⁰ These are the only rural communities within the 50,000 acre Planning Area. FOCG points to an old Subarea Plan map, which was superseded by the County's updated Subarea Plan and Comprehensive Plan Map²⁸¹ to support its position that these areas are not rural communities.²⁸² The map is no longer in effect, and simply shows the old land use designations for these rural communities. The building permit records make it quite evident where development is occurring, and it is primarily within these two communities.²⁸³ FOCG points to aerial photographs which, contrary to its assertions, show these areas as being comparatively more developed than the outlying forested lands.²⁸⁴

²⁷⁹ AR 209957 (SEPA Ex. 12, Comprehensive Plan) pg. 28.

²⁸⁰ AR 4, 5, 9 (Ordinance), Findings D-1, D-10, J-1, J-2; AR 948, 954 (Examiner Decision), Findings 2.1.4, 2.1.5, 2.4.1, and 2.4.2.

²⁸¹ AR 10 ("The Husum BZ Corner Subarea Plan ... [is] hereby superseded by the attached Husum BZ Corner Subarea Plan."); AR 51 (updated Comprehensive Plan map).

²⁸² FOCG's Brief, pg. 58, FN 214, referencing AR 210114-16 (Subarea Plan excerpt).

²⁸³ See AR 38 (map showing existing development); see also AR 819 (map depicting building permits issued from 2006-2011).

²⁸⁴ FOCG's Brief, pgs. 58-59; see AR 210765-67 (SEPA Ex. 30, aerial photographs); AR 38 (map showing existing development); AR 819 (map depicting building permits issued from 2006-2011).

FOCG repeatedly describes County zoning as low density "sprawl," but avoids defining that term. In Superior Court FOCG presented a one sentence argument supporting this issue, citing to comment FOCG submitted to the County on GMA Board decisions.²⁸⁵ Those decisions are based on a "bright line" density doctrine the Supreme Court has since rejected.²⁸⁶ In any case, GMA does not apply here and the County's zoning is consistent with the one sentence policy guidance on growth location and is certainly not arbitrary.

Further, with FOCG's approach why wouldn't the old RL zoning, which covers close to 20,000 acres, with no notice, 10,000 square foot lots, and serial density determinations on the same property every five years without mitigation be problematic? Requiring minimum one or two acres lots within the Husum and BZ Corner communities, reducing densities on 259 acres proximate to two key tributaries, and tightening the RL zoning loopholes, is consistent with this general Plan policy. The County's legislation, along with its newly updated Critical Areas Ordinance, better protects the County's environmental and natural resources, and goes further in doing so than the general goals FOCG references.²⁸⁷

²⁸⁵ CP 1302 (Plaintiffs' Amended Motion for Partial Summary Judgment), p. 80:14-17, citing to AR 452-54.

²⁸⁶ *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005) (rejecting "bright-line" approach even in counties fully planning under GMA).

²⁸⁷ AR 210281-309 (SEPA Ex 14); AR 210988-90 (SEPA Ex. 45). County briefing extensively addresses how the legislation protects fish and wildlife habitat and natural

Unchallenged findings establish that the County legislation is consistent with the Plan's sentence stating "[c]luster development **should be encouraged** so that the County can remain in its natural condition."²⁸⁸ FOCG's conclusory arguments, and its predictions of sprawling residential development taking up valuable agricultural lands, are without support. The County's designated agricultural lands are not within the area rezoned; development is occurring within this area, and would have occurred in a less predictable and less planned fashion under the old zoning; and, with not one new lot created at the time of the Court's ruling, a year after the legislation, the County has certainly not created sprawling residential development. FOCG does not address the County's clustering ordinance²⁸⁹ or the County's approach to clustering here, which is to target less than four percent of the Planning Area for growth; provide almost 20,000 acres of stricter RL zoning outside that; and leave the 30,000 acres of FR (Forest Resource) zoning intact, as addressed in the County Commissioners' unchallenged findings.²⁹⁰

resources. *See* sections 1, 2.2-2.5, 2.7, 3.3.1, and 3.3.3. The County has not designated GMA natural resources lands within the area rezoned.

²⁸⁸ AR 209972 (SEPA Ex. 12, Comprehensive Plan), p. 41, emphasis added; AR 9 (Ordinance), Findings J-1, J-2; AR 948, 954 (Hearing Examiner Decision), Findings 2.1.5 and 2.4.1; *see also* AR 199-200 (Fact Sheet).

²⁸⁹ AR 849-54 (Cluster Ordinance).

²⁹⁰ AR 9 (Ordinance), Finding J-1 ("Focusing residential development in the 4% Area, where land is already being divided; where infrastructure is better; and where services can be more efficiently provided, will better protect County resource lands, than planning for more dispersed residential growth throughout the entire Planning Area. Such an approach is intended to result in reducing County capital expenditures over time. The approach is consistent with the Comprehensive Plan."); *see also* Findings J-2 - J-4.

FOCG might make different policy choices, but that is not the question. The question is whether the choices made amount to arbitrary and capricious action. Given the County's range of discretion in implementing the three identified Plan policies, the legislative action was not arbitrary and capricious to such an extent that the County illegally spot zoned land. Summary judgment should be directed in the County's favor.

4. RESPONSE TO CROSS APPEAL

4.1. RESTATEMENT OF ISSUE ON CROSS APPEAL

As the County has basic authority to enact zoning legislation, did the Superior Court properly decline to grant FOCG's motion to find it *void ab initio*, and instead reserve the remedy question pending resolution of the County's appeal?

4.2. ARGUMENT ON CROSS APPEAL

4.2.1. Zoning is not *Void Ab Initio* Due to Procedural Violations

The Washington State Supreme Court distinguishes between municipal acts that are *ultra vires*, or entirely outside municipal power, and acts which are within municipal power but “suffer from some procedural irregularity.”²⁹¹ *Ultra vires* acts are void as no power to act

²⁹¹ *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 122-124, 233 P.3d 871 (2010) (contract to sell surplus property which did not adhere to all statutory procedures was not

existed. In contrast, acts performed without procedural or statutory compliance are not automatically void.²⁹² As the court reasoned in *South Tacoma Way*, "[i]f in this case the State was generally authorized to sell the surplus property, its act of doing so was not ultra vires."²⁹³

Klickitat County has basic police power authority to adopt zoning (Wash. Const. Art. 11, § 11). This power is further elaborated on through the RCW, Title 36, including Ch. 36.70 RCW. Thus, even if legislation is determined not to have conformed with required procedures, it is not automatically *ultra vires*. FOCG has never contended the County lacks authority to enact zoning legislation. FOCG's position is not that the County should have no zoning. At issue is a policy dispute over what that zoning should be.

4.2.2. Under *Kucera*, Even Total SEPA Non-Compliance does not Make Action *Void Ab Initio*

A balancing analysis is required before deciding whether to enjoin an action which violated SEPA. Even if there has been no SEPA compliance, action is not *void ab initio*. Even “**a total failure to follow the minimum requirements of SEPA in an environmentally sensitive**

void); see also *Kucera v. State Dept. of Transportation*, 140 Wn.2d 200, 995 P.2d 63 (2000) (ferry service continued even after complete failure to comply with SEPA).

²⁹² *South Tacoma Way, LLC v. State*, 169 Wn.2d at 124.

²⁹³ *Id.*, at 123.

area” requires a balancing of the interests before an injunction issues.²⁹⁴

In dissolving a superior court injunction on high-speed ferry operation the State Supreme Court adopted the U.S. Supreme Court's approach.

As SEPA itself contemplates the balancing of economic and environmental factors, a trial court too must apply traditional equitable principles and weigh competing interests when asked to enjoin a challenged action. ...

In *Amoco Prod. Co.*, the [United States] Supreme Court rejected the presumption that injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances. ... [T]he Court reaffirmed the bases for injunctive relief are irreparable injury and inadequacy of legal remedies, noting that in each case a court must balance competing claims.²⁹⁵

The *Kucera* decision also relies on *Weinberger v. Romero-Barcelo*, where the U.S. Supreme Court allowed an action being taken without a required permit, to continue during the compliance process.²⁹⁶ Because Washington has adopted this approach, and engages in a "balancing" analysis when injunctive relief is requested based on a SEPA violation, SEPA cannot automatically render an action *void ab initio*.

This approach is consistent with SEPA's statutory structure, which does not confer the power to legislate. It contains certain procedural

²⁹⁴ *Kucera v. State Dept. of Transportation*, 140 W.2d at 221-22, emphasis added.

²⁹⁵ *Id.*, at 224 and 223, internal cites omitted, citing to *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed. 2d 542 (1987) and *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982) (injunctive relief not automatic even when government failed to obtain required permit).

²⁹⁶ *Id.* at 222-23.

requirements. No specific mitigation is mandated, and SEPA does not even contain specific regulations governing development. "Contrary to popular belief, SEPA does not demand a particular substantive result in government decision making; rather, it ensures that environmental values are given appropriate consideration."²⁹⁷ Thus, as SEPA does not mandate a specific result, much less confer basic zoning authority, non-compliance does not mean zoning legislation is *void ab initio*.

4.2.3. FOCG's Cases are not on Point

Instead of addressing *Kucera* and *South Tacoma Way*, which govern this analysis, FOCG cites to a considerably older line of cases which do not involve remedy disputes so are not on point, and which contain analysis which is no longer good law. Further, they involve situations with significant and irreversible impacts, which is not the situation here. In one case, a county and developer conceded a 400,000-square-foot regional retail shopping center would have significant environmental impacts.²⁹⁸ In another case, land designated for natural resource use and located outside an urban growth area, was proposed for

²⁹⁷ *Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001) (MDNS upheld on 172 lot subdivision).

²⁹⁸ "Both Ross and the county evidently concede that the rezone and shopping center will have a serious adverse impact on the Barrie property." *Barrie v. Kitsap County*, 93 Wn.2d 843, 847, 613 P.2d 1148 (1980).

urban growth and annexation, something GMA now expressly prohibits.²⁹⁹

In *Eastlake*, a case in which development permits were issued before SEPA's enactment almost 45 years ago, as well as after, the Court balanced various factors in assessing whether or not SEPA applied, in an analysis that no longer applies in Washington.³⁰⁰

In contrast, FOCG's request to the Superior Court to unilaterally void County legislation would have resulted in automatic reversion to zoning which allows greater densities, lessens mitigation requirements, and reduces setbacks.³⁰¹ FOCG's request is particularly unsupportable given the very limited development which has occurred to date.³⁰² The County has notified FOCG of every proposed land division before an application is deemed complete.³⁰³ In two years, FOCG has not raised a single objection in court or appealed any plat decision. With no new lots

²⁹⁹ *King County v. Boundary Review Board*, 122 Wn.2d 843, 860 P.2d 1024 (1993); RCW 36.93.157.

³⁰⁰ *Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 497-98, 513 P.2d 36 (1973). The *Eastlake* analysis on vesting has been superseded by cases such as *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002)). See also *State v. Grays Harbor*, 122 Wn.2d 244, 857 P.2d 1039 (1993) (addressing appeal period related to DNS for rock mining operation, not remedy issues; includes analysis inconsistent with *Nyrkeim*); *Citizens v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 390 (1993) (landfill EIS upheld so there was no remedy issue to address).

³⁰¹ See section 2.7.

³⁰² CP 1444-45 (Certificate of Notice, June 18, 2013).

³⁰³ See CP 275-76, 940-41, 1444-45 (Certificates of Notice from 2012 and 2013).

created at the time the Superior Court made its decision,³⁰⁴ development is not occurring at a rate greater than under the old zoning and there are greater risks of harm under the old zoning.

4.2.4. County Action Consistent with SEPA Policy

In considering remedy issues, the courts look to SEPA's underlying policy, that "presently unquantified environmental amenities and values will be given appropriate consideration in decision making."³⁰⁵ Thus, a timber sale could only be voided where the state not only failed to prepare an EIS for the sale, but "also failed to act in accordance with the policy underlying SEPA."³⁰⁶ County action was consistent with SEPA's underlying policy to quantify environmental amenities and give such values appropriate consideration in decision making and to "fulfill the social, economic, and other requirements of present and future generations...."³⁰⁷ The County methodically planned for the measured addition of 259 new residences over a 20 year planning period.³⁰⁸ It exhaustively evaluated environmental impacts through a multi-year

³⁰⁴ *Id.*; CP 1678-79 (Certificate of Notice, February 19, 2014, Supplemental Designation of Clerk's Papers filed with this brief) (only two new lots as of February).

³⁰⁵ *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 126, 233 P.3d 871 (2010), internal citations omitted.

³⁰⁶ *Id.*, (The Supreme Court clarified its holding in *Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982)).

³⁰⁷ RCW 43.21C.020(1), .010, .030(2)(c).

³⁰⁸ AR 953 (Examiner's Decision), Findings 2.3.9-10, 2.4.1.

process, revised its proposal, engaged in extensive agency consultation, and ultimately obtained widespread agency support. In summary, with the:

- 2008 remand of SEPA determination for further analysis;³⁰⁹
- MDNS;³¹⁰
- Addendum;³¹¹
- Four incorporated EIS's including the White Salmon River EIS which evaluates development impacts in the rezoned area;³¹²
- Hydrologists' Report and Supplemental Report to Ecology;³¹³
- County-sponsored mediation which resulted in settlement with one appellant;³¹⁴
- Three day Hearing Examiner hearing, with expert testimony,³¹⁵ briefing, and FOCG's 5,242 pages of added documents supplementing the record,³¹⁶
- The State Department of Licensing, Geology Board's rejection of complaint against County's expert witnesses as being **"without merit"**;³¹⁷

³⁰⁹ AR 209854-56 (SEPA Ex. 9).

³¹⁰ AR 200108-24 (SEPA Ex. 3).

³¹¹ AR 200001-26 (SEPA Ex. 1).

³¹² SEPA Exs. 4-7, starting at AR 200125, 200497, 202120, and 208549.

³¹³ AR 200027-107 (SEPA Ex. 2); AR 548-55.

³¹⁴ AR 3, ¶ C-3. Following mediation, the County and the Confederated Tribes and Bands of the Yakama Nation achieved settlement. AR 857-62. If the update is abandoned, these cultural resource protections would sunset. AR 855, last paragraph.

³¹⁵ AR 855-62 (Settlement Agreement); AR 200005 (SEPA Ex. 1, Addendum, "County engaged the services of a mediator....").

³¹⁶ AR 211212-216454 (SEPA Exs. 101-192).

³¹⁷ AR 942-43, emphasis in text; *see also* AR 510-35.

- The 32 page Examiner decision with extensive findings, not one of which was challenged on appeal;³¹⁸ and,
- The County's legislative decision, with its extensive findings, not one of which was challenged on appeal,³¹⁹

County action was consistent with SEPA policy. The County quantified environmental values, which informed it on how best to plan for the future. Voiding of County legislation would have serious unintended consequences and impacts. The Superior Court correctly elected not to.

5. CONCLUSION

Planning for future land uses helps ensure infrastructure resiliency, preserves rural natural resource uses, and encourages residential development in the right locations. That is why the County elected to plan for its future. It planned for development exactly where it should be and closed regulatory loopholes.

Endless litigation and spreading incorrect information is destructive to that effort as it takes resources away from planning and leads jurisdictions in which planning is largely voluntary, such as Klickitat County, to question whether they should bother to plan at all. If a jurisdiction does not have the will and the resources to plan for its future,

³¹⁸ AR 947-78.

³¹⁹ AR 2-10.

it has no ability to shape that future and the results are a loss of leadership and the erosion of rural, resource-dependent industries.

Klickitat County took action to chart its future. It has been rewarded with extensive litigation by well funded opponent groups. The legal onslaught included a complaint targeting the County's two expert witnesses. The complaint was dismissed as "without merit" but forced the County witnesses to retain independent legal counsel due to the risk of professional license revocation.³²⁰ FOCG even filed a "SLAPP motion" seeking a \$10,000 penalty and attorney fees from the County for including in its answer the exact same sentence reserving the right to request attorney fees that FOCG included in its complaint.³²¹ The out of state group funding the litigation against the County has continuously misrepresented the record and impact of County actions.

This may be a function of bias. It may be difficult to believe an economically challenged rural jurisdiction can comprehensively and intelligently plan for its future. Yet, that is precisely what Klickitat County did. FOCG disputes these policy choices. But whether one agrees with them or not, these choices were not arbitrary. Indeed, in planning for future growth, the rezone legislation, rather than creating impacts,

³²⁰ AR 510-35, 942-43 (complaint, technical and legal response, and Board dismissal).

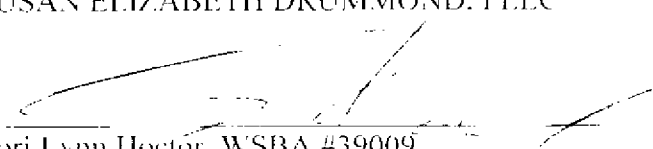
³²¹ CP 125-38 (Special Motion to Strike, August 22, 2012).

mitigates them. The standard of review for legislation is the same for all local jurisdictions be they rural or urban. To be reversed, legislation must be "arbitrary and capricious." The County's legislation was not, and its searching and thorough SEPA review was not "clear error," as the Examiner articulated in detail. By creating its false story, FOCG hurts County efforts to plan for the future. FOCG has not met its heavy burden of proof. The Superior Court decision should be reversed and summary judgment in the County's favor directed.

DATED this 28th day of July, 2014.

LORI LYNN HOCTOR
Prosecuting Attorney for Klickitat County, and

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC



Lori Lynn Hoctor, WSBA #39009
Susan Elizabeth Drummond, WSBA #30689

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2014, I served the foregoing
KLICKITAT COUNTY'S COMBINED RESPONSE BRIEF AND
REPLY ON CROSS APPEAL on the parties below by e-mail and first
class U. S. mail, postage prepaid.

Nathan J. Baker Friends of the Columbia Gorge 522 SW 5 th Avenue, Suite 720 Portland, OR 97204-2100 nathan@gorgefriends.org	Ralph O. Bloemers Crag Law Center 917 SW Oak Street, Suite 417 Portland, OR 97205 ralph@crag.org
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I declare under penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct to the best of my
knowledge.

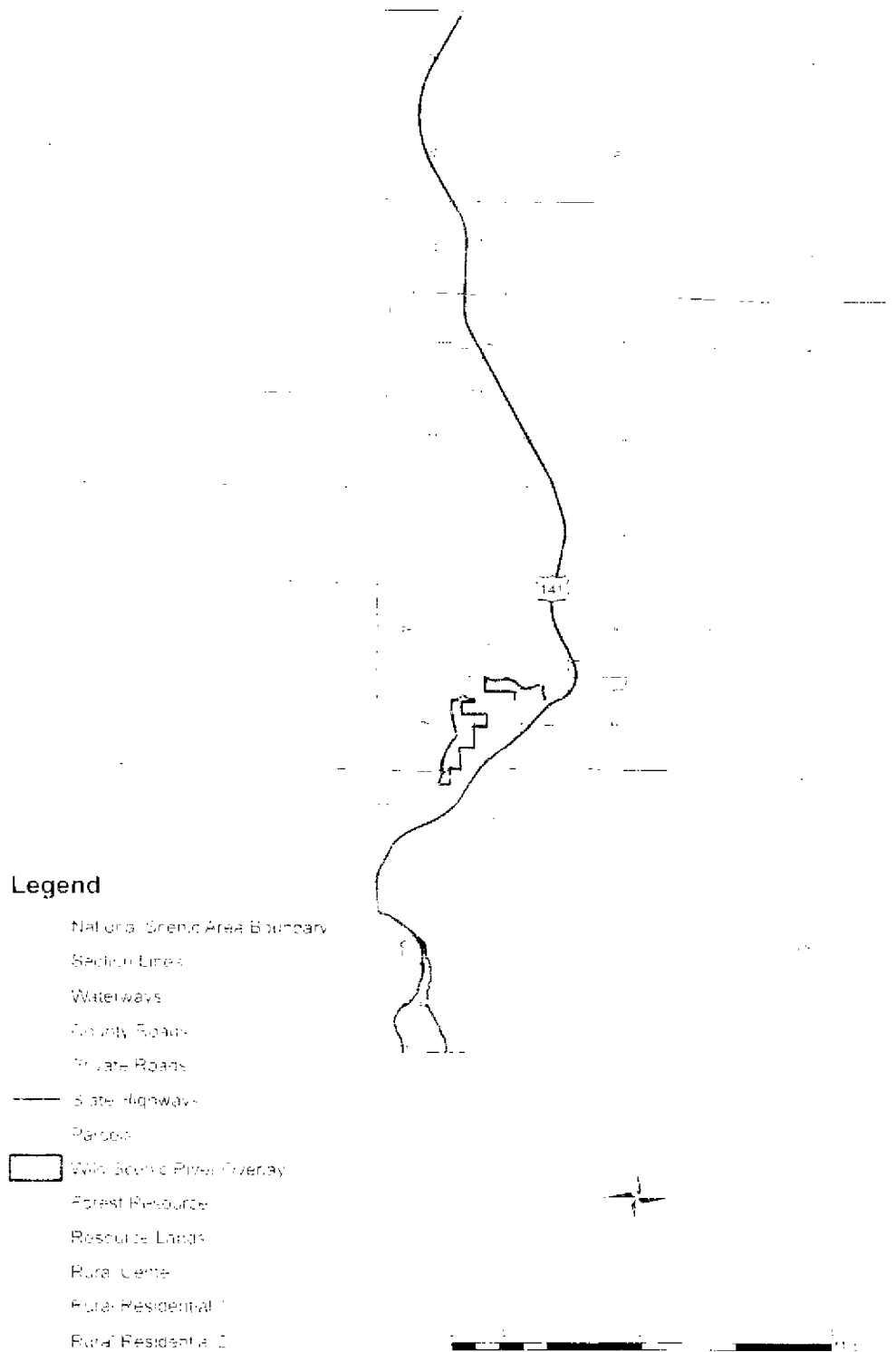
SIGNED this 28th day of July, 2014, at Kirkland, Washington.

Allyson Adamson
Allyson Adamson, Legal Assistant

Tab 1

**Zoning Map
(AR 12)**

Husum BZ Corner Planning Area Zoning Map



LAW OFFICES OF SUSAN ELIZABETH DRUMMOND, PLLC

July 28, 2014 - 1:52 PM

Transmittal Letter

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Court of Appeals Case Number: 45269-3

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Comments:

Attached for filing is Klickitat County's Combined Response Brief and Reply on Cross Appeal. Color copies of Appendix 1 are being mailed to the Court. (The County will also be filing with the Court a Motion to File Over-Length Brief.)

Sender Name: Susan E Drummond - Email: allyson@susandrummond.com

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